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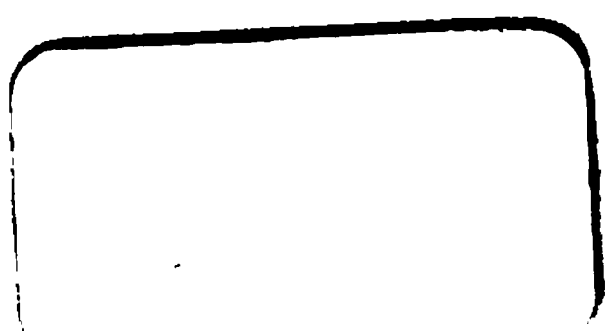
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4



THE
AMERICAN STATE REPORTS.

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

Vol. LVI.

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AMERICAN STATE REPORTS.

VOL. LVI

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS Vol. 111.	17- 80
CALIFORNIA REPORTS Vol. 115.	81-158
FLORIDA REPORTS Vol. 38.	159-188
ILLINOIS REPORTS Vols. 164, 165.	184-287
INDIANA APPEALS Vol. 14.	288-322
KENTUCKY REPORTS Vol. 98.	323-391
MAINE REPORTS Vol. 89.	392-446
MINNESOTA REPORTS Vol. 63.	447-488
MISSOURI REPORTS Vol. 134.	488-550
MONTANA REPORTS Vol. 18.	551-599
NEW YORK REPORTS Vol. 151.	600-649
NORTH CAROLINA REPORTS Vol. 119.	650-694
OHIO STATE REPORTS Vol. 54.	695-741
PENNSYLVANIA STATE REPORTS . . Vol. 178.	742-777
TENNESSEE REPORTS Vol. 97.	778-827
WEST VIRGINIA REPORTS Vol. 41.	828-910

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49; (104, 105) 53; (106, 107, 108) 54; (109, 110) 55; (111) 56.

ARKANSAS. — (48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 23; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59) 43; (60) 46; (61, 62) 54.

CALIFORNIA. — (72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 13; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52; (112) 53; (113) 54; (114) 55; (115) 56.

COLORADO. — (10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52; (22) 55.

CONNECTICUT. — (54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 43; (66) 50; (67) 52.

DELAWARE. — (5 Houst.) 1; (6 Houst.) 22; (7 Houst.) 40; (9 Houst.) 43.

FLORIDA. — (22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 43; (36) 51; (37) 53; (38) 56.

GEORGIA. — (76) 3; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35; (91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54.

IDAHO. — (2) 35.

ILLINOIS. — (121) 3; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56.

INDIANA. — (112) 3; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3, Ind. App.; 141) 50; (4, 5, 6, Ind. App.; 142) 51; (7, 8, Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56.

AMERICAN STATE REPORTS.

CASES REPORTED.

VOL. LVI.

NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. New Jersey St. Co.....	<i>Carriers</i>	151 N. Y. 163...	616
Adcock v. Smith.....	<i>Exemptions</i>	97 Tenn. 373....	810
Alley v. Hopkins.....	<i>Suretyship</i>	98 Ky. 668.....	382
American Ex. Bank v. Loretta M. Co.....	{ <i>Banks</i>	165 Ill. 103.....	233
American Freehold L. M. Co. v. Dykes.....			
Ashley W. Co. v. Illinois Steel Co.	<i>Corporations</i>	164 Ill. 149.....	187
Atkins v. Field.....	<i>Master and servant</i> .	89 Me. 281.....	424
Baker v. Bartlett.....	<i>Conveyances</i>	18 Mont. 446....	594
Baltimore etc. Ry. Co. v. Scholes...	<i>Contracts</i>	14 Ind. App. 524	307
Bank v. Sneed.....	<i>Lunatics</i>	97 Tenn. 120...	788
Barker v. Central Park R. R. Co.	<i>Carriers</i>	151 N. Y. 237...	626
Berkin v. Marsh.....	<i>Guardian and ward</i>	18 Mont. 152...	565
Bessemer L. & I. Co. v. Jenkins....	<i>Cemeteries</i>	111 Ala. 135....	26
Betcher v. Hodgman.....	<i>Interest</i>	63 Minn. 30....	447
Bierman v. City Mills Co.....	<i>Principal and agent</i>	151 N. Y. 482....	635
Booth v. Foster.....	<i>Advancement</i>	111 Ala. 312....	52
Bowler v. Braun.....	<i>Negotiable inst's</i> ...	63 Minn. 32....	449
Bracken v. State.....	<i>Seduction</i>	111 Ala. 68.....	23
Brockway Mfg. Co., In re.....	<i>Corporations</i>	89 Me. 121.....	401
Brown v. Pettit.....	<i>Negotiable inst's</i> ...	178 Pa. St. 17 ...	742
Buchanan v. Supreme Conclave I. O. H.....	{ <i>Beneficiary ass'ns</i> .	178 Pa. St. 465...	774
Central Ky. L. Asy. v. Craven.....			
Chicago v. Seben.....	<i>Municipal corp'ns</i> ..	165 Ill. 371.....	245
Cincinnati etc. Ry. Co. v. Bank....	<i>Bank check</i>	54 Ohio St. 60...	700
Conlee v. Clark.....	<i>Mechanics' liens</i> ...	14 Ind. App. 205	298
Coogler v. Rhodes.....	<i>Libel</i>	38 Fla. 240.....	170
Coombs v. Beede.....	<i>Architects</i>	89 Me. 187.....	406
Cooper v. Hamilton.....	<i>Acknowledgment</i> ...	97 Tenn. 285....	795
Crocker v. Manley.....	<i>Fraud</i>	164 Ill. 282.....	196

NAME.	SUBJECT.	REPORT.	PAGE.
Deck v. Tabler.....	<i>Resulting trusts</i>	41 W. Va. 332..	837
De Martin v. Phelan.....	<i>Mortgages</i>	115 Cal. 538.....	115
Doane v. Lake St. Ry. Co.....	<i>Streets</i>	165 Ill. 510.....	
Dobson v. More.....	<i>Corporations</i>	164 Ill. 110.....	184
Elliott v. Kitchens.....	<i>Animals</i>	111 Ala. 546.....	69
Ellis v. Pratt City.....	<i>Garnishment</i>	111 Ala. 629.....	76
Embdan v. Lisherness.....	<i>Judgments</i>	89 Me. 578.....	442
Emery, Appellant.....	<i>Judgment pend- ing bankruptcy.</i> }	89 Me. 544.....	440
Ermentrout v. Girard etc. Ins. Co...	<i>Insurance</i>	63 Minn. 305...	481
Ferguson v. Anglo-Am. Tel. Co....	<i>Telegr'ph companies</i>	178 Pa. St. 377. .	770
Fidelity etc. Co. v. Eickhoff.....	<i>Insurance</i>	63 Minn. 170...	464
Fink v. Farmers' Bank.....	<i>Official bonds</i>	178 Pa. St. 154..	746
First Nat. Bank v. Huntington D. Co.	<i>Judgments</i>	41 W. Va. 550..	878
Foley v. California Horseshoe Co...	<i>Master and servant</i>	115 Cal. 184.....	87
Foley v. Royal Arcanum.....	<i>Insurance</i>	151 N. Y. 196...	621
Fort v. Wells.....	<i>Conversion</i>	14 Ind. App. 531	346
Francisco v. Ryan.....	<i>Chattel mortgages</i> ..	54 Ohio St. 397.	711
Gay v. Murphy.....	<i>Bonds</i>	134 Mo. 98.....	496
Geer v. Missouri L. & M. Co.....	<i>Deeds</i>	134 Mo. 85.	489
Goff v. Miller.....	<i>Non-neg. inst'ments</i>	41 W. Va. 683..	889
Goldnamer v. O'Brien.....	<i>Assault</i>	98 Ky. 569.....	378
Gould v. Great Northern R. Co....	<i>Railroads</i>	63 Minn. 37....	453
Green v. Taylor.....	<i>Partnership</i>	98 Ky. 330.....	375
Gunter v. State.....	<i>Criminal law</i>	111 Ala. 23.....	17
Harris v. Murphy.....	<i>Evidence</i>	119 N. C. 34.	656
Hass v. Burton.....	<i>Brokers</i>	14 Ind. App. 8..	288
Henline v. Reese.....	<i>Official bonds</i>	54 Ohio St. 599.	736
Herriman v. Menzies.....	<i>Monopolies</i> ..	115 Cal. 16.....	81
Herzog v. Heyman.....	<i>Patents</i>	151 N. Y. 587... .	646
Hill v. Pennsylvania Ry. Co.....	<i>Negligence</i>	178 Pa. St. 223..	754
Hissam v. Parrish.....	<i>Specific performance</i>	41 W. Va. 686..	892
Holleman v. Harward.....	<i>Husband and wife</i> ..	119 N. C. 150....	672
Hosler v. Beard.....	<i>Insanity</i>	54 Ohio St. 398.	70
Industrial Bank v. Bowers.....	<i>Bills of exchange</i> ...	165 Ill. 70.....	223
Kentucky Wagon M. Co. v. Ohio etc. R. Co.....	<i>Railroads</i>	98 Ky. 152.....	326
Kimmer v. Weber.....	<i>Master and servant</i>	151 N. Y. 417... .	630
Kirk v. Norfolk & W. Ry. Co.....	<i>Railways</i>	41 W. Va. 722..	899
Klepper v. Cox.....	<i>Banks</i>	97 Tenn. 534... .	823
Knope v. Nunn.....	<i>Cotenancy</i>	151 N. Y. 506....	642
Koen v. Bartlett.....	<i>Life tenancy</i>	41 W. Va. 559..	884
Kramer v. Old.....	<i>Restraint of trade</i> ..	119 N. C. 1.....	650
Lafontain v. Hayhurst.....	<i>Service with promise of marriage.</i> }	89 Me. 388.....	430

CASES REPORTED.

13

NAME.	SUBJECT.	REPORT.	PAGE.
Lake v. Hancock	Conveyance	38 Fla. 53.....	159
Lancashire Ins. Co. v. Corbetts	Garnishment	165 Ill. 592.....	275
Lewis v. Hodapp	Estoppel	14 Ind. App. 111	295
Lewiston v. Gagne	Official bonds.....	89 Me. 395.....	432
Louisville & N. R. R. Co. v. Mc- Elwain	Negligence	98 Ky. 700.....	385
Mader v. Cool	Negotiable inst's....	44 Ind. App. 299	304
Manchester v. Guardian Assur. Co.	Insurance.....	151 N. Y. 88.	600
Marshall v. Boardman	Shipping	89 Me. 87.....	392
Marston v. Kennebec M. L. Ins. Co.	Life insurance.....	89 Me. 266.....	412
Martin v. Martin	Vendor's lien	164 Ill. 640.....	219
Maxcy M. Co. v. Barnham	Agency	89 Me. 538.....	436
McCall v. Hampton	Expectancies	98 Ky. 166.....	335
McCauley v. Building & Sav. Assn.	Building & loan associations..	97 Tenn. 421. ..	813
McGhee v. Wilson	Homestead	111 Ala. 615.....	72
McKay v. Southern Bell T. Co.....	Electric wires.....	111 Ala. 337.....	59
McNulta v. Corn Belt Bank	Banks	164 Ill. 427.....	203
McShane v. Kenkle	Mining laws.....	18 Mont. 208... ..	579
Merchants' etc. Bank v. Barnes.....	Garnishment	18 Mont. 335... ..	586
Merchants' N. Bank v. Spates.....	Mun. indebtedness..	41 W. Va. 27... ..	828
Miller v. Miller	Parent and child... ..	38 Fla. 227.....	166
Mitchell v. Rochester Ry. Co.....	Damages	151 N. Y. 107... ..	604
Moran v. Pullman P. C. Co.....	Mun. corporations..	134 Mo. 641.....	543
Morrison v. Clark	Easement — Judgment. }	89 Me. 103.....	395
Morrison v. Rogers	Marriage brokerage.	115 Cal. 252.....	96
Murray v. Murray	Maintenance— Receivers... }	115 Cal. 226.....	97
Newman v. King	Neg. instruments... ..	54 Ohio St. 273..	705
Oppenheimer v. Bank	Neg. instruments... ..	97 Tenn. 19... ..	778
Pennsylvania Co. v. McCann	Negligence.....	54 Ohio St. 10... ..	695
Peters v. Bowman	Trespass	115 Cal. 345.....	106
Prudential Ins. Co. v. Young.....	Insurance, life.....	14 Ind. App. 560	319
Ravenswood etc. Ry. Co. v. Ravens- wood	Municipal bonds... ..	41 W. Va. 732..	906
Reich v. Cochran	Judgment	151 N. Y. 122... ..	607
Rocky Mt. Mills v. Wilmington etc. Ry. Co.....	Railroads.....	119 N. C. 693... ..	682
Sammis v. Sly	Sheriffs	54 Ohio St. 511. ..	731
Sands v. Potter	Master and servant.	165 Ill. 397.....	253
Schultz v. Howard	Negotiable inst's... ..	63 Minn. 196... ..	470
Shea v. Murphy	Deeds	164 Ill. 614.....	215
Shew v. Call	Mortgages.....	119 N. C. 450....	678
Sievers v. San Francisco	Mun. corporations..	115 Cal. 648.....	153
Singleton v. State	Pardoning power ..	38 Fla. 297.....	177
Smith v. S. F. & N. P. Ry. Co.....	Corporations.....	115 Cal. 584.....	119

NAME.	SUBJECT.	REPORT.	PAGE.
Smith v. Wildman.....	<i>Exec'trs and admrs.</i>	178 Pa. St. 245..	759
Southern etc. Assn. v. Dawson.....	<i>Elevators</i>	97 Tex. 367.....	804
Southern etc. Assn. v. Norman.....	<i>Building etc. Assn.</i>	98 Ky. 294.....	367
State v. Board of P. & D.....	<i>Mandamus</i>	134 Mo. 296.....	503
State v. Branch	<i>Guardian and ward.</i>	134 Mo. 592	533
State v. Butte City W. Co.....	<i>Pleading</i>	18 Mont. 199...	574
State v. Camp Sing	<i>Constitutional law..</i>	18 Mont. 128...	551
State v. Cody.....	<i>Criminal procedure.</i>	119 N. C. 908....	692
State v. Murphy.....	<i>Mun. corporations..</i>	134 Mo. 548.....	515
State v. Southern Ry. Co.....	<i>Sunday laws</i>	119 N. C. 814....	689
State v. Sutton.....	<i>Constitutional constr.</i>	63 Minn. 147...	459
State Sav. Bank v. Johnson.....	<i>Corporations</i>	18 Mont. 440...	591
Stone v. Kellogg	<i>Corporations</i>	165 Ill. 192.....	240
Stout v. Philippi M. Co.....	<i>Lis pendens</i>	41 W. Va. 339..	844
Taylor v. Owensboro.....	<i>Mun. Corporations.</i>	98 Ky. 271	361
Thorington v. Hall.....	<i>Devise</i>	111 Ala. 323.....	54
Tillinghart v. Merrill.....	<i>Public officers</i>	151 N. Y. 135...	612
Turle v. Sargent.....	<i>Neg. instruments</i> ...	63 Minn. 211...	475
West Chicago S. Ry. Co. v. Mueller..	<i>Evidences</i>	165 Ill. 499.....	263

AMERICAN STATE REPORTS.

VOL LVI

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

GUNTER v. STATE.

[111 ALABAMA, 23.]

CRIMINAL LAW—PUNISHMENT—ACTS CONSTITUTING BUT ONE CRIME.—A defendant cannot be lawfully punished for two distinct offenses, growing out of the same identical act, where one is a necessary ingredient of the other. Hence, if the same act of unlawful shooting results in the death of two persons, a conviction or acquittal on a trial for the murder of one would be a good defense on a second trial for the alleged murder of the other.

CRIMINAL LAW—PUNISHMENT—TWO OR MORE OFFENSES IN ONE TRANSACTION.—One person may, at the same time and as part of the same transaction, commit two or more distinct criminal offenses, and a conviction or acquittal of one will not bar a prosecution and punishment for the others. Therefore, if one, in the same affray, shoots and kills one person, and, by a second act, shoots and wounds another, the two acts are distinct, and the party shooting may be indicted and punished separately for each.

FORMER ACQUITTAL, PLEA OF, WHEN INSUFFICIENT AND DEMURRABLE.—If one is indicted for an assault with intent to murder, a plea of former acquittal under an indictment charging him with the murder of a different person, where the assault and killing charged were done at the same time and place, is not good, unless it positively and clearly alleges that there was but one act or blow which resulted in the crimes alleged; and the plea is demurrable if such allegation of the main fact is so made that it must be taken as a matter of inference.

ASSAULT TO MURDER—EVIDENCE—CONCLUSION OF WITNESS.—If the person assaulted, on a trial for assault with intent to murder, testifies that the defendant shot him without any cause or provocation, and that they had always been friends, it is proper to disallow a question asked him by counsel for the defendant as to whether or not the shooting was accidental, as the answer would be a mere conclusion of the witness.

ASSAULT TO MURDER—EVIDENCE—AGE.—There is no error, on a trial for an assault with intent to murder, in allowing the person assaulted to testify that he was but eighteen years of age at

the time, as this tends to show the relative conditions of the parties at the time of the assault.

PRACTICE.—OBJECTIONS TO EVIDENCE are not available unless the grounds of objection are specified.

ASSAULT TO MURDER—EVIDENCE—CORROBORATION. Upon a trial for an assault with intent to murder, after the person assaulted has testified that the assault was made without cause or provocation, and that, at the same time, the defendant killed another person by shooting him in the back, while he was making no demonstration toward the defendant, it is proper to allow this testimony to be corroborated by that of a witness, who had examined the body of the deceased, that there was a wound in the back, and it is unobjectionable for the witness to locate, upon the back of a solicitor, who is standing up, where the wound was on the dead man.

ASSAULT TO MURDER—EVIDENCE—WHAT INADMISSIBLE.—The testimony of a witness, on a trial for an assault with intent to murder a certain person, that he had sold a knife, several months before the assault, to another person who was killed by the defendant in the same difficulty, and had seen the person killed, before the homicide, try to cut the defendant on one occasion, is clearly inadmissible.

ASSAULT TO MURDER—MOTIVE—AGGRESSOR.—If there is evidence, upon a trial for an assault with intent to murder that the person assaulted and another, while on their way to the defendant's store, threatened to kill the defendant, which threat was communicated to him immediately afterward, and that upon their arrival at the store, armed with pistols, and after a few remarks between themselves, such other person fired at the defendant, whereupon the latter shot and killed him, and then shot and wounded the other, evidence that on the preceding night, these two men waylaid the house where defendant lived is relevant and admissible not only as tending to show their motive in going to defendant's store, but as corroborative of their communicated threats to kill the defendant, and to aid the jury in determining as to who was the aggressor.

Indictment for an assault with intent to murder one Monroe Davis. The defendant interposed a plea of former acquittal, to which the state demurred on the ground: 1. That the plea showed on its face that the offense charged in the indictment was a different and distinct offense from the one alleged in the plea; 2. That the defendant had been tried for the murder of George Breazle, and was here on trial under an indictment for an assault with intent to murder. The defendant was convicted and appealed.

Inzer & Ward and J. E. Brown, for the appellant.

William C. Fitts, attorney general, for the state.

²⁵ **HARALSON, J.** 1. It is the settled rule of this court that a defendant cannot be lawfully punished for two distinct felonies growing out of the same identical act, and where one is a necessary ingredient of the other; that a series of charges cannot be based upon the same offense, and subdivided into two or

more indictable crimes. So, it has been held that where the same act of unlawful shooting resulted in the death of two persons, an acquittal or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other, for the reason that the killing constituted but one crime, which could not be subdivided and ²⁶ made the basis of two prosecutions: *Clem v. State*, 42 Ind. 420; 13 Am. Rep. 369. And again, where one blow produces two separate assaults and batteries on two different persons, a conviction of one may be pleaded in bar to an indictment for the other, for the reason that the defendant cannot be punished for two distinct assaults growing out of the same identical act: *State v. Damon*, 2 Tyler, 387; *State v. Cooper*, 13 N. J. L. 361; 25 Am. Dec. 490. These cases and the principles announced were referred to and approved in *Hurst v. State*, 86 Ala. 604; 11 Am. St. Rep. 79; where the same question was considered and decided by this court upon a careful review of many authorities. Hurst was indicted, tried, and convicted for having introduced a file into the county jail, with the intent to facilitate the escape of a prisoner, confined on a charge of misdemeanor. At the same term of the court, defendant was indicted, tried, and convicted for the same act of conveying into the county jail the same file with which to facilitate the escape of another prisoner, confined on a charge of a felony, and it was held, on a plea of autrefois convict, that the first conviction was a bar to the indictment in the latter case: *O'Brien v. State*, 91 Ala. 25; *Moore v. State*, 71 Ala. 307; *Gordon v. State*, 71 Ala. 317.

It must not be overlooked, however, that the same individual may at the time and in the same transaction commit two or more distinct criminal offenses, and the acquittal of one will not bar punishment for the other, as if, in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another. In such case, the two results, the killing of the one and the wounding of the other, by different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately for each: *State v. Standifer*, 5 Port. 523; *Cheek v. State*, 38 Ala. 231, and authorities *supra*.

The plea in this case sets up that the defendant was indicted for the murder of George Breazle, and that he was tried and acquitted therefor. Among other facts pleaded it is stated: "And the said defendant says, that he is in fact, that he was so indict-

ed and acquitted as aforesaid, is one and the same person, and that the assault and murder of which he, the said Robert Gunter, ²⁷ was so indicted and acquitted as aforesaid, and the assault with intent to commit murder of and for which defendant is now indicted are one and the same assault, and committed at one and the same time; that the killing of said Breazle took place under the same prosecution, and not other and different assaults, for other and different prosecutions, but that it was one transaction committed at one and the same time," etc. The above is a loose and very unskillful averment, if that was the intention, of the identity of the act by which the killing of the one and the wounding of the other person was affected. It speaks of two assaults, the death of one person following the one, and the wounding of another following the other, and avers that they are one and the same assault under one and the same prosecution, and not other and different assaults for other and different prosecutions, that it was one transaction, committed at one and the same time. This would seem to be the averment of a legal conclusion, rather than of a fact—an averment that the assaults were one, in the sense that for them different prosecutions could not be maintained. If there had been but one pistol shot fired by defendant, which struck two men, killing one and wounding the other, it would have been an easy matter to so aver, but there is an apparent cautious omission of such an averment, and to substitute for it the nearest approach that the pleader could make to it—an allegation of a conclusion, the main fact to be taken as a matter of inference, rather than from positive averment. Construing the plea most strongly against the pleader, we hold it was insufficient and subject to demurrer.

2. The party assaulted, Debtor, had testified that the defendant shot him without any cause or provocation, and that he and defendant had always been friends. Defendant's counsel then asked the witness: "Pistol must have gone off accidentally then?" This question was properly disallowed. It was a jeer, implying falsehood to the witness, and, if answered, would have been the mere conclusion of the witness, as would have been the answer to the next question, which the court ruled to be improper: "Will you tell the jury whether the shooting was accidental?"

There was no error in allowing the witness to state ²⁸ that he was about eighteen years old at the time he was shot. This was a pertinent inquiry as tending to show the relative conditions of the parties at the time of the assault: *Commonwealth v. Selfridge* (Mass.), *Cases of Self Defense*, 3.

3. The witness, Thompson, for defense, had examined the body

of Breazle, after he was shot. He was asked on cross-examination by the state solicitor, to state where the wound was. The witness stated that he had a wound hole in his back, and pointed out on the back of the solicitor where the wound was on the deceased. The defendant objected to this evidence separately, but specified no grounds of objection. The objections were properly overruled for want of specific objections, and because the evidence tended to corroborate the evidence of Debtor, that Breazle was shot in the back, while making no demonstration against the defendant. The person of the solicitor, standing up, was an unobjectionable illustration, in locating on his back, where the wound was on the dead man.

4. The witness, Thompson, was also asked to state, "Whether or not about this time (August, 1891) George Breazle bought a knife, and if you heard him say what he was going to do with it?" He replied "that he sold Breazle a knife, and saw him, Breazle, try to cut defendant." The state objected to the question and answer, and the court excluded the latter part of it as to witness having seen Breazle try to cut defendant with it. There was no error in excluding that part of the answer, as the whole of it was irrelevant, and the part excluded, even if a former difficulty had been relevant, went into the particulars of such difficulty. But what such a transaction as that called for, in August, 1891, between defendant and Breazle had to do with the difficulty between defendant and Debtor in December, 1891, does not appear and is difficult to conceive.

5. The witness for the defense, Steve Gunter, testified that defendant lived in his house and was at home the night before the killing took place. Defendant's counsel asked the witness to "state whether or not these men, Debtor and Breazle, waylaid your house the preceding night, and how you knew it?" The court, on the objection of the solicitor, excluded the evidence. The question called for a fact within the knowledge of the ²⁰ witness. Debtor had testified he was shot by defendant without cause or provocation, was unarmed and doing nothing at the time. The evidence for the defense tended to show that Breazle and Debtor, just before the killing, on their way to the store where it occurred, threatened to kill defendant, which threat was communicated to defendant immediately afterward. The evidence for the defense also tended to show that both these parties, just after their threat to kill defendant, went to his store, armed with pistols, and stood in the side door, opposite to where defendant was standing; that Breazle said to Debtor, "If you are going to do that dancing, it is time you were at it," to which Debtor replied,

"I am ready"; that Breazle presented the pistol at defendant and fired, after which defendant shot him, and then, immediately, shot Debtor. Under these circumstances, we think the fact, if it were true, that these two men, the preceding night, waylaid the house where defendant lived was admissible, on the several grounds, as tending to show their motive in going to defendant's store; was corroborative of their communicated threats to kill defendant, and to aid the jury in determining the question about which there was conflicting evidence, as to who was the aggressor. The evidence stands, as to such matters and for such purposes, upon the same footing as threats whether communicated or not: *Roberts v. State*, 68 Ala. 156; *Clarke v. State*, 78 Ala. 477; 56 Am. Rep. 45; 3 *Brickell's Digest*, 289, sec. 627.

For the error in excluding this evidence, the case must be reversed.

Reversed and remanded.

CRIMINAL LAW—PUNISHMENT—OFFENSES INVOLVED IN ONE TRANSACTION—FORMER ACQUITTAL OR CONVICTION. If the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note; *Hurst v. State*, 86 Ala. 604; 11 Am. St. Rep. 79; as, where the same act results in the death of two or more persons, and the person committing the act is convicted or acquitted on the trial of an indictment for the murder of one, he cannot be indicted for the murder of the other: *Clem v. State*, 42 Ind. 420; 13 Am. Rep. 369. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime: *State v. Emery*, 68 Vt. 109; 54 Am. St. Rep. 878, and note; note to *People v. Bentley*, 11 Am. St. Rep. 228. A record of conviction or acquittal of an assault with intent to kill is a bar to a prosecution for assault and battery, or assault, growing out of the same difficulty: *Jones v. State*, 66 Miss. 380; 14 Am. St. Rep. 570. If the same act constitutes two or more distinct offenses, each crime is separately indictable, and a conviction or acquittal of one is not a bar to prosecution for the others: Note to *Jones v. State*, 14 Am. St. Rep. 572; *Hooper v. State*, 30 Tex. App. 412; 28 Am. St. Rep. 926. Thus if two are murdered by the same act, a conviction or acquittal as to one does not bar a prosecution as to the other: Note to *People v. Bentley*, 11 Am. St. Rep. 228.

TRIAL.—AN OBJECTION TO THE ADMISSION OF EVIDENCE must disclose the ground of the objection: *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503; *McCartney v. Shepard*, 21 Mo. 573; 64 Am. Dec. 250.

BRACKEN v. STATE.

[111 ALABAMA, 63.]

SEDUCTION — CONVERSATIONS — EXAMINATION OF WITNESS.—If the prosecutrix, upon cross-examination, on a trial for seduction, denies having told a third person, in conversation, that she had been seduced by the defendant, she should be allowed, on redirect examination, to state what she did say.

SEDUCTION—EVIDENCE.—CRIMINATIVE LETTERS written by the defendant, in a prosecution for seduction, to the prosecutrix, after the date of the alleged seduction, are admissible in evidence, where the handwriting has been proved, and the genuineness of the letters is not denied.

SEDUCTION—EVIDENCE—DESTROYED LETTER ABOUT MARRIAGE.—The testimony of the prosecutrix, on a trial for seduction, that she received a letter from the defendant, in which he said something about marrying her, is admissible, although she destroyed the letter, if it is not shown that she had any wrong motive in doing so.

SEDUCTION—CONFESSIONS.—A SUFFICIENT PREDICATE for the admission of a confession, made to a witness by the defendant, in a prosecution for seduction, is laid, and the confession is admissible in evidence, where it is shown that the witness, a brother of the prosecutrix, went to a field, where the defendant was at work, and had a conversation with him, at which no third person was present; that at the time he had no weapon with him, made no threats, and held out no promises or inducement to the defendant, and that he did not say that it would be better for the defendant to tell all about it.

SEDUCTION—CRIMINAL INTIMACY WITH OTHER MEN. EVIDENCE that the prosecutrix, on a trial for seduction, had been criminally intimate with other men after the date of her alleged seduction is inadmissible.

INSTRUCTIONS.—REQUESTS for improper, argumentative, and confusing instructions are properly refused.

SEDUCTION—HOW ACCOMPLISHED—INSTRUCTIONS.—The offense of seduction accomplished by means of temptation, deception and arts and acts of flattery, is as criminal as if accomplished by a promise of marriage. Hence, it is proper to refuse a charge which ignores this manner of accomplishing the crime.

Indictment for seduction. Delia Roney was the prosecutrix, Ed Roney, a witness for the state, testified that he was a brother of Delia Roney; that he went one day to the field where the defendant was at work and had a conversation with him; that at that time he had no weapon, made no threats and held out no promises or inducement to the defendant, nor did he say that it would be better for the defendant to tell all about it; and that no one was present except the defendant and himself. He was then asked the following question: "State what the defendant said to you in that conversation?" This question was objected to by the defendant on the ground that no predicate was laid

upon which the confession could be properly admitted. The objection was overruled and the defendant excepted. The witness then testified to a confession made by the defendant in which he said that he had promised to marry Delia Roney. Evidence was introduced by the state tending to show that the defendant was guilty as charged. The defendant was convicted and took an appeal.

R. H. Walker, for the appellant.

William C. Fitts, attorney general, for the state.

⁷⁰ HARALSON, J. There was no error in allowing the prosecutrix to state that she told Judge Gordon that her pregnancy resulted from an act of intercourse which the defendant had with her on the 17th of June, 1894. Defendant had asked her on cross-examination if she had not told Judge Gordon that she had been seduced by defendant on the 17th of June, 1894, to which she replied she had not, and the question to her by the solicitor on the redirect examination was for her to state what that conversation was, and what she told Judge Gordon. The defendant called for what he supposed it was, for the ⁷¹ evident purpose of contradicting her, and she had the right to state what it was she told the judge: Louisville etc. R. R. Co. v. Malone, 109 Ala. 509.

The letters of defendant to the prosecutrix written after the date of the alleged seduction were properly admitted in evidence. His handwriting was fully proved, and the genuineness of the letters was not denied. Their contents were of a criminative character against defendant, and tended to sustain the prosecution.

Nor was there error in allowing the prosecutrix, in her examination, to state that she had received a letter from defendant between January and April, 1893, in which he said something to her about marrying her. The letter was shown to have been torn up and destroyed, because, as the witness stated, she had no use for it. It did not appear that she had destroyed it from any wrong motive.

The witness, Ed Roney, proved an admission or confession by defendant. The predicate for it was fully laid before the court admitted it in evidence, and objections to its admission were properly overruled.

There was no error in not allowing defendant to prove criminal intimacy with other men since the date of her alleged seduction by defendant. The real inquiry is as to the chastity of the woman at the time of the alleged criminal act, and not at a sub-

sequent period: *Munkers v. State*, 87 Ala. 94; *Hussey v. State*, 86 Ala. 34; *Wilson v. State*, 73 Ala. 527; *Boyce v. People*, 55 N. Y. 614.

The charges given by the court for the state appear to be free from objection. The first, second, third, and fifth charges requested by defendant and refused were requests for improper, argumentative, and confusing instructions, and were each properly refused: *Hussey v. State*, 86 Ala. 34.

The fourth charge predicates an acquittal on the belief of the jury beyond reasonable doubt of the prosecutrix having been induced to submit to intercourse with defendant by a promise of marriage, and ignores reference to its having been accomplished by means of temptation, deception, arts and acts of flattery, which the evidence tends to show, and by which, if accomplished, the seduction would be as criminal, under the statute, as if induced by a promise of marriage.

We find no error in the record, and the judgment and ⁷² sentence of the court below are affirmed: *Anderson v. State*, 104 Ala. 88.

Affirmed.

SEDUCTION may be accomplished by means of influence and persuasion, intended to reach, and actually reaching, that result, without a promise of marriage: *Hallock v. Kinney*, 91 Mich. 57; 30 Am. St. Rep. 462; note to *Putnam v. State*, 25 Am. St. Rep. 742. Subsequent acts of intercourse may be shown to explain the relations of the parties; but proof of illicit intercourse by a seduced female with other men after her seduction is, of course, inadmissible. See monographic note to *Weaver v. Bachert*, 44 Am. Dec. 173, 177, on the action for seduction. A conviction for seduction will be reversed where the jury was not instructed concerning the meaning of the word "seduction," as used in the statute: *Putnam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 738.

INSTRUCTIONS—WHAT SHOULD BE REFUSED.—Conflicting, indefinite, ambiguous, or misleading instructions, should not be given, and it is not error for the court to refuse to do so: See monographic note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 127, on instructions to the jury; *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 362; 1 Am. St. Rep. 362. Argumentative instructions are properly refused: *Hays v. Gainesville Street Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748. So instructions not appropriate to the issue as tendered and accepted are properly refused: *De Votie v. McGerr*, 22 Am. St. Rep. 426.

BESSEMER LAND & IMPROVEMENT CO. v. JENKINS.

[111 ALABAMA, 185.]

TRESPASS—PLEADING—DESCRIPTION OF PREMISES.—

In an action of trespass quare clausum fregit, the description of the close alleged to have been broken, though not particularly definite, is sufficient, if the defendant is not misled, or uncertain as to the particular locus in quo.

CEMETERIES—ACTION FOR REMOVAL OF REMAINS—DESCRIPTION OF PREMISES.—In an action of trespass for removing the body of plaintiff's child from its burial place, the complaint is not demurrable on the ground that the close alleged to have been broken is not described with sufficient accuracy, where it is described as a burial lot in a graveyard, near a city named, in a certain county, which graveyard is now included in land occupied by a designated manufacturing company, but which, for many years, has been used and occupied as a burying ground, having been dedicated for that purpose by the defendant.

CEMETERIES—REMOVAL OF REMAINS—RIGHT TO MAINTAIN ACTION FOR.—As a dead body becomes, after burial, a part of the ground to which it has been committed, one who buries his dead in soil to which he has a freehold right, and to the possession of which he is entitled, can maintain an action of trespass quare clausum fregit against anyone who digs or disturbs the grave.

CEMETERIES—REMOVAL OF REMAINS—POSSESSION GIVING RIGHT OF ACTION.—If one has been permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to maintain an action of quare clausum fregit against the owners of the fee, or strangers who, without his consent, negligently or wantonly disturb it.

CEMETERIES—LIMITATION UPON TITLE OF LOTOWNERS.—One's exclusive right to the possession of a spot of ground, in a public cemetery, in which his dead are buried, is limited to the time during which the ground is used for burial purposes; but, when the cemetery is discontinued, and the bodies are to be removed, notice should be given to the party entitled, if known, and it can be given, and, if he fails to remove the remains, the removal by others must be done in a decent manner.

CEMETERIES—REMOVAL OF REMAINS—IRRELEVANT EVIDENCE.—In an action of trespass to recover damages for removing the body of plaintiff's child from its burial place upon land owned by the defendant, but used as a public cemetery, the real issue is the question of plaintiff's rightful possession of the soil where the body was buried. Hence, evidence as to where the coffin came from, who dug the grave, the cost of the casket, and the amount of other funeral expenses is wholly irrelevant and immaterial, and should be excluded. So, the fact that, when the defendant's agent removed the body of the plaintiff's child to another burial place, without notice to the plaintiff, such agent had knowledge of the plaintiff's residence, cannot be proved by evidence of transactions between the agent and plaintiff which occurred long before the agency was created.

WITNESSES—EVIDENCE OF OMISSION FROM BOOK OR PAPER OF PARTICULAR FACT.—A witness, with a writing in his hands, may testify that it does not contain a particular fact.

Hence, the secretary and bookkeeper of a corporation, having its minute-books in his hands, may testify that no part of a particular report made by officers of the corporation, at a meeting of the stockholders, was rejected by the latter, so far as the books show, notwithstanding defendant's objection that the proper evidence is the minutes of the meeting.

WITNESSES—EVIDENCE OF INTEREST.—As evidence of a witness' interest is admissible, a witness for the plaintiff should be allowed, for the purpose of showing his interest against the defendant, to answer the question whether the plaintiff has not brought suit against him for the same thing and whether that suit has been finally determined.

CEMETERIES—DEDICATION OF LAND FOR—EQUITABLE ESTOPPEL.—If an owner of land leads the public to believe that he has dedicated it to a public use by permitting and encouraging people to bury their dead in a cemetery thereon, the principle of equitable estoppel applies with peculiar force, and he will not be allowed to deny the fact of such dedication, to the prejudice of those whom he has misled. He cannot, therefore, any more than a stranger, unlawfully interfere with or desecrate a grave by removing the remains therein.

INSTRUCTION — ASSUMING CREDIBILITY OF EVIDENCE.—A charge which assumes the credibility of evidence is erroneous. Hence, upon the issue as to whether premises, in which a burial was had, had been dedicated, it is erroneous for the court, of its own motion, to instruct the jury that the undisputed evidence shows that, prior to the interment, such premises had been dedicated by the defendant for burial purposes.

CEMETERIES—REMOVAL OF REMAINS—DAMAGES—INJURY TO FEELINGS.—In an action of trespass to recover damages for the unlawful removal of plaintiff's child from its burial place, the injury to the natural feelings of the plaintiff may be considered, by the jury, in estimating the damages.

CEMETERIES—REMOVAL OF REMAINS—BASIS OF ACTION FOR.—The right to bring an action to recover damages for unlawfully removing remains from a grave in a cemetery does not rest upon such facts as the erection of a head-board at the grave, putting turf around it, and planting trees at the head and foot thereof, but upon the other and higher consideration of an easement or license.

CEMETERIES—REMOVAL OF REMAINS—RECOVERY OF DAMAGES FOR.—In an action to recover damages for the alleged unlawful removal of the body of plaintiff's child from one cemetery to another, it is error to instruct the jury that, if the plaintiff had actual possession of the soil where the body was buried, he is entitled to recover, where there is evidence that the plaintiff knew, or had notice that the defendant had discontinued the old cemetery, where the plaintiff's child was first buried, and that parties were requested to remove their dead to the new cemetery provided by the defendant in lieu of the old, notwithstanding there is also evidence that the defendant removed the body without notice to the plaintiff, without his knowledge or consent, and without notice to him to remove it.

NEW TRIAL—REMOVAL OF REMAINS FROM GRAVE—DAMAGES—EXCESSIVE VERDICT.—In an action to recover damages for the alleged unlawful removal of the body of plaintiff's child from an old to a new cemetery, a verdict for seventeen hundred dollars is excessive, and should be set aside for that reason,

where the testimony shows that the new cemetery is more desirable for burial purposes than the old one, and that the disinterment and reinterment, although done without notice to the plaintiff, and without his knowledge or consent, were conducted in an orderly and decent manner.

Action of trespass quare clausum fregit, by James A. Jenkins against the Bessemer Land & Improvement Company, for the unlawful invasion of a burial lot, without the plaintiff's consent, and exhuming and carrying away the body of plaintiff's child. The premises upon which the trespass was said to have been committed were thus described in the complaint: "That the lot or close in which the body of said child was buried is situated in a burying ground or graveyard near Bessemer in said Jefferson county, which burying ground or graveyard is now included in the land occupied by the Pipe Works Company, in or near said Bessemer, which said burying ground or graveyard had been for many years before that time used and occupied as a burying ground or graveyard by the public, having been set apart, or dedicated, by defendant company as and for a public burying ground or graveyard." A demurrer to the complaint, on the ground that the premises were not described with sufficient definiteness, was overruled. The Bessemer Land & Improvement Company had, in 1887, inclosed a certain tract of land belonging to it, situated on Nineteenth street, in the town of Bessemer, and set it apart as a public burying ground. It was so used by the public from 1888 until 1890, but no lots were sold by the company, and it did not appear that the company had any actual charge or control of interments made in the tract. The cemetery rights were in the custody of the city engineer of Bessemer, to whom all applications had to be made. Jenkins, under an arrangement between himself and one S. E. Jones, had his child buried in one of the lots of the cemetery, on October 7, 1888. Jones was an undertaker, and undertook to sell the lot to Jenkins, as well as to furnish the casket, to dig the grave, and to inter the body. This was all done without the company's knowledge, and it appeared that the company had no knowledge that the child was buried until this suit was brought. The Bessemer Land & Improvement Company, early in the year 1890, contracted to sell the tract of land embraced within the Nineteenth street cemetery to the Howard-Harrison Iron Company, and, about the same time, donated thirty acres, about one and a half miles from the Nineteenth street cemetery to the Cemetery Company, for the use of the citizens of the town of Bessemer, and arranged with the latter company that a space should be set aside for the inter-

ment of the bodies that were to be removed from the old burying ground. It was a matter of common knowledge, in the town of Bessemer, that the works of the Howard-Harrison Iron Company were being erected on the site of the old cemetery. The structures erected by that company were begun in June, 1890, and not completed until seven or eight months afterward. The structures were very large and plainly visible from the residence of Jenkins, who lived about a mile and a quarter away. The erection of the company's plant, and the removal of the bodies, were subjects discussed by the newspaper of the town, in several issues, before the actual removal of the bodies, and Jenkins was a subscriber for this paper. No notice was sent to Jenkins of the intention to remove his child's body, and he testified, on the trial, that the first time he became informed of the removal of the bodies, or of the intention to remove them, was in 1891, and that he never consented to the removal of his child's body. The disinterment of remains took place in January, 1890, under a contract between the Improvement Company and said S. E. Jones, and the disinterment and reinterment were conducted in an orderly and decent manner. The evidence also showed that the new cemetery to which the body of plaintiff's child was removed was more desirable and better adapted as a burial ground than the old cemetery. Among the charges asked by the defendant, but which were refused, were the following: "The court charges the jury that, if they believe from the evidence, in this case, that the only possession Jenkins had of the land wherein the body of his child was buried consisted in the burial of the child and the subsequent beautification of his grave, and if the jury further believe from the evidence that Jenkins was never in actual possession of any lot or particular piece of ground in which his child's body was buried, then the jury will find a verdict for the defendant." "4. The court charges the jury that, if they believe the evidence in this case, they cannot award the plaintiff damages for the purpose of compensating for any injury to his feelings." "7. The court charges the jury that they cannot award the plaintiff damages in this case for injuries to his feelings. 8. The court charges the jury that, under the evidence in this case, if they believe the evidence in this case, the Nineteenth street property described as the old cemetery, was never dedicated by the Bessemer Land & Improvement Company for use as a cemetery." The jury awarded a verdict for seventeen hundred dollars damages, and there was a motion made for a new trial on the ground that the

verdict was excessive. This was overruled, and judgment was rendered for the plaintiff assessing his damages at seventeen hundred dollars, in accordance with the verdict, and the defendant appealed.

Walker Percy, for the appellant.

Cabaniss & Weakley and B. L. Hibbard, for the appellee.

¹⁴⁵ HARALSON, J. 1. The close alleged to have been broken by defendant is not described in the complaint with definite particularity, but sufficiently so to prevent the defendant from being misled or uncertain as to the particular locus in quo of the trespass complained of. If a more accurate description had been made, it would have given the defendant no better information as to the venue of the realty, than that furnished by the complaint: 2 Chitty on Pleading, 609. The demurrer, which questioned the sufficient accuracy of the lot or close which plaintiff alleges defendant broke and trespassed on, was properly overruled.

2. The case was tried on the two pleas of "not guilty," and "that at the time of said alleged trespass, the defendant had the rightful possession of the land on which said trespass is alleged to have been committed." There were other errors assigned on account of the rulings of the court on the pleadings, which have not been insisted on in argument, and will be treated as waived.

3. Exactly what the rights of one are to the burial place of his dead—in the absence of a fee to the soil, or his right to the possession thereof—as respects the maintenance of a civil action for its disturbance, is one of delicate and, as yet, not very satisfactory solution. People have so much respect for the final resting place of the dead, and there is so little to tempt one to disturb their repose, cases are of rare occurrence where such disturbances have become the subject of litigation and the adjudication of the courts. Those that have arisen have generally, as in this case, grown out of the removal of the dead from one place to another, for purposes, as claimed, of health, convenience, or the better care, preservation, and ornamentation of these burial places.

Cooley, in his work on Torts, says: "In respect to the burial of the dead, if anywhere, shall we find in the common law a recognition of the legal rights of the family as an aggregate of persons. Even in that case, however, the recognition is very faint and uncertain. ¹⁴⁶ An unlawful interference with the buried

dead of a family might probably be restrained by injunction on their joint application, and the owner of the lot in which the body was deposited might maintain trespass *quare clausum fregit* for its disinterment, and recover substantial damages, in awarding which the injury to the feelings would be taken into consideration"; and he adds that the common law did not recognize the bodies of the dead as property, belonging to the surviving relations, "though it did recognize a property in the shroud or other apparel of the dead as belonging to the person at the charge of the funeral": Cooley on Torts, 239, 240.

Blackstone in his Commentaries, referring to the subject, says: "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any suit or action against such as indecently, at least, if not injuriously, violate and disturb their remains, when dead and buried. The person, indeed, who has the freehold of the soil may bring an action of trespass against such as dig and disturb it; and, if anyone in taking up a dead body steals the shroud or apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral": 1 Blackstone's Commentaries, 429.

It seems to be very generally agreed that a dead body is not the subject of property rights, and becomes, after burial, a part of the ground to which it has been committed, and that an action *quare clausum fregit* may be maintained by any person who has the fee to the soil, if entitled also to the possession, against one who digs and disturbs the grave. But to entitle one to this action, he must have the actual or constructive possession of the soil: *Meagher v. Driscoll*, 99 Mass. 284; 96 Am. Dec. 759; *Weld v. Walker*, 130 Mass. 422; 39 Am. Rep. 465; *Guthrie v. Weaver*, 1 Mo. App. 136; *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 480; *Shipman v. Baxter*, 21 Ala. 456; *Ledbetter v. Blassingame*, 31 Ala. 496; *McInerney v. Irvin*, 90 Ala. 276; 3 Am. & Eng. Ency. of Law, 54; *Bonham v. Loeb*, 107 Ala. 604.

When one buries his dead, therefore, in soil to which he has the freehold right, or to the possession of which he is entitled, it would seem there is no difficulty in his protecting their graves from insult or injury, by an action ¹⁴⁷ of trespass against a wrongdoer. But bodies are most commonly interred in public cemeteries, where the parties whose duty it is to give them burial are not the owners of the soil by deed properly executed, and have no higher right than a mere easement or license. Of such

it is held that they do so under a mere license, and their exclusive right to make such interments in a particular lot would be limited to the time during which the ground continued to be used for burial purposes; and, upon its ceasing to be so used, all they could claim would be, that they should have due notice and an opportunity to remove the bodies to some other place of their own selection, if they so desire, or, on failure to do so, that the remains should be decently removed by others: 3 Am. & Eng. Ency. of Law, 50, and authorities cited; 1 Washburn on Real Property, sec. 33.

In *Partridge v. First Ind. Church*, 39 Md. 637, a case of one who buried in a church cemetery under license from the trustees, it was held that while the license continued the grantee could bring trespass or case for any invasion or disturbance of the grave, whether done by the grantors or strangers. But it was said: "If, in the course of time, it should become necessary to vacate the ground as a burying ground, all that he could claim, in law or equity, would be that he should have due notice and the opportunity afforded to him of removing the bodies and monuments to some other place of his own selection, or that, on his failing to do so, such removal should be made by others": 1 Washburn on Real Property, sec. 33; *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. Rep. 377.

In *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 480, it was said: "Such right of burial is not an absolute right of property, but a privilege or license, to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires. It is a right of limited use for purposes of interment, which gives no title to the land," analogous to the grant of a pew in a meeting-house, and resembling a pew tenancy: *Craig v. First Pres. Church*, 88 Pa. St. 42; 32 Am. Rep. 417; *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. Rep. 377; *Windt v. German etc. Church*, 4 Sand. Ch. 471; *Richards v. Northwest etc. Dutch Church*, 32 Barb. 42; *Sohier v. Trinity Church*, 109 Mass. 1; *Bryan v. Whistler*, 8 Barn. & C. 288; *Wood v. Leadbetter*, 14 Mees. & W. 837. It would ¹⁴⁸ seem, therefore, to accord with right principle and authority that where one is permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to action against the owners of the fee or

strangers, who, without his consent, negligently or wantonly disturb it. This right of possession will continue as long as the cemetery continues to be used; but if, for proper and legal reasons, it should be discontinued, and the license withdrawn, and the bodies of the dead are to be removed, it must be done decently, only after due notice to the party entitled, if known, and such notice can be given.

4. A dedication of land has been defined to be the act of devoting or giving of the property to some public object in such manner as to conclude the owner: *Forney v. Calhoun County*, 84 Ala. 220; 5 Am. & Eng. Ency. of Law, 395. It may be done verbally or by writing, by a single act or a series of acts, if clear and unequivocal, as indicating the owner's intention. But a presumption of dedication will not follow from mere user, without more, for any period short of twenty years: *Steele v. Sullivan*, 70 Ala. 589; *Forney v. Calhoun Co.*, 84 Ala. 215. In the latter case it was said: "The doctrine of equitable estoppel applies with peculiar force to cases of this kind. When the owner of land involuntarily, or by culpable negligence, leads the public to believe that he has dedicated it to a public use, he will, upon every principle of fair and conscientious dealing, be estopped from denying the fact of such dedication to the prejudice of those whom he has misled. . . . To be effective and valid, a dedication [as was there held] must be accepted, and such acceptance may be shown either by some positive conduct of the proper public officers, evincing their consent in behalf of the public, or may be inferred from official acts of implied recognition on their part, or by long public use, or from the beneficial nature of the dedication": *Gage v. Mobile etc. R. R. Co.*, 84 Ala. 224.

5. Making application of these principles to the errors assigned, and it appears that the question to the plaintiff on his examination as a witness in his own behalf, by his counsel, "Whom did you buy that coffin ¹⁴⁹ from?"—the one in which the child was buried—was wholly irrelevant to the case against the defendant company. It was not pretended that it knew when or from whom the coffin was purchased, or that the corpse of the child was even put in it and buried. It was calculated to confuse, by withdrawing the minds of the jury from the real issue—the rightful possession of the soil by plaintiff.

6. And, on the same grounds, the several objections to the introduction of the receipt of S. E. Jones, showing the cost of the casket, the digging of the grave, the shroud and carriages for

the funeral, and that these items had been paid by the plaintiff, should have been excluded.

7. The question, "Who had the grave dug?" was illegal. The answer was, that S. E. Jones had it done. It was not pretended, nor was it shown, that Jones was the agent of the defendant, or that it had anything to do with the digging of the grave. If the land had been dedicated for the purpose of a public cemetery, as alleged in the complaint, and the plaintiff had burial rights therein in consequence, it was wholly immaterial who dug the grave. If it had been shown that Jones was the agent of the defendant in the digging of the grave, the evidence might, perhaps, have been properly admitted. And so it was improper to allow the plaintiff to prove that far back, before the burial of the child, he had sold plaintiff a bedroom set of furniture. If it tended to show that Jones knew plaintiff and had knowledge that he resided in Bessemer, the transaction occurred before Jones had any agency of defendant for the removal of the bodies from the old to the new cemetery.

8. McNutt, who was the secretary of the defendant company at the time, testified that the old cemetery—the one in which plaintiff's child was buried—was inclosed in the latter part of 1887, by order of Mr. Berney, the vice-president of the company, and was used as a burying ground from that time until some time in 1890, during which time it was in the hands of the engineer of the city of Bessemer, and parties wishing to bury in it were referred by the company to said engineer. It was shown, that at the first annual meeting of the stockholders, a report was made by the directors or officers in charge, reciting, among other things, that ¹⁵⁰ "a convenient, eligible, and picturesque site for the burial of the dead is always a source of gratification and pride to citizens, as well as attractive, and favorable comment to visitors. Such a location the company selected and set aside for the purpose, and has had it suitably inclosed, laid off into lots, drives, and walkways, at an expense of five hundred and eighty-five dollars and eighty-nine cents. In time, by small charges for interment plots, the expense of its continued ornamentation and improvement will be more than met." The question was propounded to the witness, "Was any part of the report rejected by the stockholders at that meeting?" This was objected to on the ground, "that the only proper way to prove the action of the stockholders' meeting was by the minutes of the meeting." The question was allowed, and the witness answered that no part of it was rejected.

It will be noticed, that the question and answer did not refer to what particular action was taken on the report, but rather that no action was taken at all. There is a difference in testifying to what appears on a minute-book, without its production, and testifying that a particular thing does not appear on the minutes, especially if the minute entries are in the hands of the witness when testifying. The witness had the books, as it appears, and testified that there was "not a word in the minutes of any of the meetings of the directors or stockholders of the company relating to the cemetery on Nineteenth street"—the one in question. The books being in the hands of the secretary and book-keeper of defendant, it was not improper for him to testify, against defendant's objection, that no part of the report was rejected, so far as the books showed. The defendant, whose books they were, might have shown by their introduction that this statement, if untrue, was incorrect. The report itself was not subject to the objection of irrelevancy. It tended to prove the fact of dedication as averred in the complaint.

9. The question propounded to the witness Jones, "Has suit been brought against you by Mr. Jenkins, the plaintiff in this case, growing out of the removal of the same body, and has that suit been finally determined?" should have been allowed to be answered. Its tendency was, if slight, to show the interest of the witness against the defendant.

10. There was no error in refusing the general charge ¹⁵¹ for defendant. Its giving is sought to be justified on the ground that the evidence showed, without conflict, that the defendant had not dedicated this property for burial purposes; that plaintiff, therefore, derived no right to the soil in which the grave was dug, and that the allegations of the complaint, that there was a dedication and consequent right growing therefrom, had failed. But the proofs referred to above do tend to show a dedication; that the dead of the community, including plaintiff's child, were buried in the cemetery with the knowledge, consent, and license of defendant, and that the plaintiff and the public generally, were encouraged to bury their dead there. If this was true, the defendant would be estopped to deny plaintiff's right to and possession of the spot of land for the purposes used, and it could not, therefore, any more than a stranger, unlawfully interfere with or desecrate it: *Davidson v. Reed*, 111 Ill. 167; 53 Am. Rep. 613. For like reasons, the eighth charge requested by defendant was properly refused.

The court, upon its own motion, charged the jury that "the undisputed evidence shows that that lot or that cemetery on Nineteenth street had, prior to the time of the burial of plaintiff's child therein, been dedicated by the Bessemer Land Company for burial purposes." This charge assumed the credibility of the evidence—a question for the jury—and was upon its effect, without request, and was, for these reasons certainly, erroneous.

11. There was no error, under the evidence, in refusing charges 3, 4, and 7. It is nowhere denied that in actions of this character, when maintainable, the injury to the natural feelings of the plaintiff may be taken into consideration in estimating the damages: Cooley on Torts, 240; 3 Am. & Eng. Ency. of Law, 54; Meagher v. Driscoll, 99 Mass. 284; 96 Am. Dec. 759.

12. The fact that plaintiff erected a headboard at the grave and put turf around it, and planted two cedar trees, one at its head and the other at its foot, if done with the knowledge and consent of defendant, which is not shown, would tend to show possession by plaintiff; but these acts of his, without more, would not authorize him to bring this action, as was assumed by the court in its oral charge to the jury. It made too much of these facts. The right to maintain the action rested on other and higher considerations.

¹⁵² 13. There was evidence tending to show that plaintiff had such actual possession of the plot of ground as authorized him to bring this suit if his possessory rights were invaded. There is no dispute as to the fact that Jones, the undertaker, was employed by defendant to remove the bodies of the dead from the old to the new cemetery, and that he did dig up and remove the plaintiff's child's remains; and it tends to show that this was done without the knowledge or consent of the plaintiff, and without notice to him to remove them himself. But, there was also evidence tending to show that plaintiff did know or have notice that defendant had discontinued the old cemetery, and parties were requested to remove their dead to the new one provided by the company in lieu of the old. There was error, therefore, in that part of the court's oral charge, which reads, "If the plaintiff had actual possession, why then I charge you, as a matter of law, that the plaintiff in this action would be entitled to recover."

14. There was a motion for a new trial, on the ground, among others, that the verdict of the jury for seventeen hundred dollars was excessive. We do not hesitate to say that these damages, under the evidence in this case, were excessive, and that the verdict for that reason ought to have been set aside.

15. We have noticed only such of the many errors assigned as have been insisted on. What has been said of these will be sufficient for the purposes of another trial.

Reversed and remanded.

TRESPASS—DISTURBING THE REMAINS OF THE DEAD.—Possession, either actual or constructive, is necessary to maintain trespass: *Gent v. Lynch*, 23 Md. 58; 87 Am. Dec. 558; *McClain v. Todd*, 5 J. J. Marsh. 335; 22 Am. Dec. 37. Trespass quare clausum fregit cannot be sustained by the owner of property, not in possession, nor entitled to the possession thereof, at the time of the alleged trespass: *Arneson v. Spawn*, 2 S. Dak. 269; 39 Am. St. Rep. 783, and note. This is the only action that can be brought for disinterring a dead body, and lies in favor of the grantee of a cemetery lot, against the superintendent of the cemetery, for disinterring and removing therefrom the remains of the plaintiff's child: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759.

CEMETERIES—REMOVAL OF REMAINS—ACTION—DAMAGES.—The privilege of burial in a public cemetery is a mere license, subject to municipal regulation, and revocable according to public necessity: *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481; *Hancock v. McAvoy*, 151 Pa. St. 460; 31 Am. St. Rep. 774. There is no property in the dead body of a human being: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370; monographic note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 513, on the rights and duties of relatives and others respecting the bodies of the dead; *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759. After burial it becomes a part of the ground to which it has been committed: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 513. Damages may be awarded for injury to the plaintiff's feelings in an action of trespass quare clausum fregit against the superintendent of a cemetery, for disinterring and removing therefrom the remains of the plaintiff's child, where the defendant has acted in willful disregard or careless ignorance of the plaintiff's rights: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759. After a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper authority: Note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 514.

CEMETERIES—TITLE OF LOTOWNER—LIMITATION.—The purchaser of a lot in a cemetery acquires no title to the soil, but only the right of burying his dead: Note to *Louisville v. Nevin*, 19 Am. Rep. 80; *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. Rep. 377; note to *Hancock v. McAvoy*, 31 Am. St. Rep. 776. The right of burial in a public burying ground is an easement in, not a title to, a freehold, and is subject to such changes as public necessity may require: Note to *Craig v. First Presbyterian Church*, 32 Am. Rep. 426; *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481.

CEMETERIES—DEDICATION—ESTOPPEL.—One who has dedicated land as a public burying ground, the dedication having been accepted, is estopped from denying it: *Boyce v. Kalbaugh*, 47 Md. 334; 28 Am. Rep. 464; and may be prohibited from meddling with the graves thereon, at the suit of any one having relations or friends buried there: *Davidson v. Reed*, 111 Ill. 167; 53 Am. Rep. 613.

INSTRUCTIONS—ASSUMING CREDIBILITY OF WITNESSES OR EVIDENCE.—A court has no right, in charging a jury, to express or intimate what has or has not been proved during the trial: *Beverly*

v. Burke, 9 Ga. 440; 54 Am. Dec. 351. The credibility of witnesses is a question for the jury: Prince v. State, 100 Ala. 144; 46 Am. St. Rep. 28; and it is error for the court to instruct that certain evidence is or is not sufficient to establish a particular fact: See monographic note to State v. Whit, 72 Am. Dec. 545, on the proper subjects of instructions to juries, and to what extent a judge may comment upon the evidence. A general charge on evidence in favor of a party is an invasion of the province of the jury, where an inference of fact is necessary to be drawn before such party is entitled to recover: White v. Hass, 32 Ala. 430; 70 Am. Dec. 548.

NEW TRIAL—EXCESSIVE VERDICT.—A verdict will not be set aside on the sole ground that it is excessive, in a case where mental anguish or distress is an element of actual damage, for the estimation of which the law furnishes no rule, unless it appears that the jury have acted from passion, prejudice, or other improper influence: Western Union Tel. Co. v. Broesche, 72 Tex. 654; 13 Am. St. Rep. 843. The supreme court will set aside a verdict as excessive in exceptional cases: Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438; 22 Am. St. Rep. 781.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY v. DYKES.

[111 ALABAMA, 178.]

DEPOSITIONS.—EX PARTE CERTIFICATES are not depositions; neither are they such documentary testimony as may, by a rule of chancery practice, be proved *viva voce* at the hearing. They are purely hearsay and, upon objection, are not admissible in evidence.

INFANTS — CONTRACTS — RATIFICATION OR DISAFFIRMANCE.—The contract of an infant, whether executed or executory, being merely voidable and not void, may, upon his arriving at majority, be repudiated by him, or may be ratified and confirmed, without any new consideration, when his minority ceases.

INFANTS — CONTRACTS — AVOIDANCE OF, WITHOUT RESTORING CONSIDERATION.—An infant, upon arriving at majority, may avoid his contract, though he has, during minority, wasted or consumed the consideration received for it.

INFANTS — CONTRACTS — AVOIDANCE OF, NECESSITY OF RESTORING CONSIDERATION.—If an infant, upon reaching his majority, yet retains what he received by virtue of his contract, or any substantial portion thereof, or the proceeds thereof, he cannot disaffirm or repudiate his contract without restoring or abandoning to the use of the other party that which remains in his possession of the consideration received.

INFANTS — CONTRACTS — AVOIDANCE OF—REQUIRING ACCOUNT OF CONSIDERATION.—If an infant, upon arriving at the age of majority, seeks relief in equity from his contract, or sues at law to recover what he parted with, or interposes his disability as a defense to an action at law or in equity, he may be required, on demand or suit, to account for so much of the consideration as he retains and holds at the time he reaches the age of twenty-one.

INFANTS — CONTRACTS—RATIFICATION—SILENT ACQUIESCENCE.—If an infant has parted with property, or has used

or consumed, during minority, all of the consideration received by him, under a contract made by him during his minority, delay in making his election will neither benefit him nor injure others, because he retains nothing and need restore nothing. Hence, under the circumstances, silent acquiescence, unconnected with affirmative acts, for any period short of the statutory bar, when there is room for the operation of the statute, does not amount to a ratification.

INFANTS—CONTRACTS—RATIFICATION BY ACQUIESCENCE.—If an infant, after reaching majority, still retains what he received by virtue of his contract made during minority, or a substantial portion thereof, or the proceeds thereof, time becomes an important element, and he must, within a reasonable time, under all the circumstances, give notice, in an appropriate manner, of his election to disaffirm his contract. If he does not do so, but retains the thing received, using and enjoying it as owner, his conduct will be a ratification by acquiescence.

INFANTS — CONTRACTS — RATIFICATION — ACTS AMOUNTING TO.—An infant may ratify his contract either by express promise, or by such affirmative acts as selling, mortgaging, or converting to his own use, after attaining majority, the property purchased or procured, or by paying the interest on the debt contracted. A retention and enjoyment, after attaining majority, of the property purchased, as owner will, also, in the absence of dissent, within a reasonable time, operate as a complete ratification.

INFANTS — CONTRACTS — RATIFICATION OR DISAFFIRMANCE—ENTIRETY OF CONTRACT.—The contract of an infant must be avoided or affirmed as an entirety. There is no such thing as a partial ratification of such a contract; and, if the infant, upon attaining his majority, has effectually ratified it in part, such ratification will be treated as imparting validity and binding efficacy to the entire contract and to all its terms.

INFANTS—RATIFICATION OF MORTGAGE CONTRACT BY RETENTION OF LAND.—If an infant borrows a large sum of money, and gives a mortgage on land as security, and uses a part of the money, as provided in the application for the loan, to pay off the purchase price of a part of the land, which was an encumbrance or lien thereon, such land will be treated as the specific consideration received by the infant for the mortgage contract to the extent of the amount advanced for the purpose of paying off such lien; and the retention of the land by the infant, after attaining majority, using, claiming, and enjoying it, for nearly two years after minority has ceased, constitutes not only a ratification of the purchase of a part of the land, but an entire ratification of the mortgage contract, rendering it a binding obligation for the whole amount of the mortgage debt.

INFANTS—CONTRACTS—RATIFICATION BY MARRIED WOMAN.—As a married woman has a constitutional right to purchase property, she may ratify a purchase previously made. Hence, if she, though married, makes a purchase of land during her infancy, the fact of her coverture does not affect a ratification made by her after her minority ceases.

INFANTS—RATIFICATION OF SEPARATE CONTRACTS. If an infant borrows money, an agreement to pay a loan company a commission for securing the loan is not ratified, after the infant attains majority, by a ratification of the contract made with the lender, at a different time, as the two are separate and distinct contracts.

INFANTS — CONTRACTS — RATIFICATION—PLAINTIFF MUST PLEAD ACTS OF.—If infancy is pleaded as a defense to a bill to foreclose a mortgage, which merely alleges the execution of the mortgage, and the default, the complainant is not entitled to a decree on the ground of ratification, unless he amends his bill, and pleads the facts constituting the ratification relied on to avoid such defense.

Bill in equity to foreclose a mortgage. It was filed by the mortgage company against Mattie O. Dykes, Thomas A. Dykes, her husband, and the Loan Company of Alabama. It was decreed that the complainant was not entitled to the relief prayed for in its bill, and it was ordered that the original bill and cross-bill be dismissed without prejudice. From this decree, the complainant and the Loan Company of Alabama appealed.

Pettus & Pettus and M. E. Milligan, for the appellants.

M. Sollie and W. D. Roberts, for the appellees.

182 HEAD, J. The bill was filed on the twenty-fourth day of December, 1892, in the chancery court of Dale county, and had for its purpose the foreclosure of a mortgage, executed by Mattie O. Dykes and her husband on the seventh day of October, 1890, upon her lands, to secure the sum of two thousand three hundred dollars, loaned by the complainant to her.

The bill alleges that Mattie O. Dykes applied to the Loan Company of Alabama to negotiate a loan for her upon said lands; that said company placed the loan with the complainant; that the notes given for the money, and the mortgage given to secure same, were executed and delivered to the complainant, and that the money was paid over to one Manghen, the agent and attorney of the borrower. The bill also alleges that, along with the delivery of the notes and mortgage, the husband of the borrower, Thomas A. Dykes, made and delivered an affidavit, to the effect that his wife had a perfect and indefeasible title in fee simple to the real estate described in the mortgage; that the same was free from encumbrances, except the mortgage of complainant; that said mortgage was valid in law and in fact, and that it was a first lien upon the premises. The bill also alleges that these representations were made for the purpose of obtaining the loan, for the security of which said mortgage was executed.

The bill then alleges that Mattie O. Dykes and Thomas A. Dykes "are each over the age of twenty-one years," and shows a default in the payment of the mortgage debt, which, according to the terms thereof, authorized a foreclosure.

Mattie O. Dykes and her husband were made parties defend-

ant, as was also the Loan Company of Alabama, which corporation the bill shows took a second mortgage on the same lands to secure its commission for negotiating the loan. The Loan Company of Alabama filed an answer and cross-bill, seeking the foreclosure of its mortgage, admitted by it to be subordinate to that of complainant. The other defendants answered; the said Mattie O. Dykes setting up, by way of plea, that she "was an infant under the age of twenty-one years on the seventh day of October, 1890, at the time of the execution of said notes and mortgage described in said original ¹⁸³ bill." There was an agreement of counsel "that the chancellor, in passing on the facts in this case, will consider any legal exception that could be interposed to any exhibit attached to the bill, answer, or any deposition of any witness, or to any of the evidence, the same as if it had been filed," and this agreement was included in the note of submission.

When the application was made, Mattie O. Dykes owed one James seven hundred dollars, the whole purchase price of a part of the lands, which was an encumbrance or lien, at least upon such part; but whether it was a vendor's lien or mortgage does not appear. The application states that the money was to be borrowed to pay off this encumbrance and a mortgage to one Clark, and the testimony shows without dispute that of the amount procured and paid over to Manghen, seven hundred dollars went to James to pay the purchase price of that part of the lands bought of him; thirteen hundred dollars was paid to Clark to satisfy his mortgage; two hundred dollars was handed the said Mattie O. Dykes, which she paid to field hands on her place, and Manghen retained one hundred dollars.

The record contains what purports to be an affidavit of Thomas A. Dykes, the husband, containing the statements in reference to it alleged in the bill. These allegations were denied by the answer, and there was no proof that he ever made that affidavit; nor is the affidavit shown by the note of submission to have been offered in evidence. It was not shown that any one of the affidavits above referred to were ever presented to the complainant, or that the complainant relied thereon in paying over the money. It is testified by Nelson that what purported to be an affidavit, called the final affidavit, was sent to the Loan Company of Alabama along with the notes, and a certificate of the probate judge showing recording of the mortgage, but it is not shown what this final affidavit contained, nor that it ever passed beyond the loan company, which, as far as the record shows, was only the borrower's agent.

On final hearing, the chancellor dismissed the original and cross-bill without prejudice, and the mortgage company and loan company both appeal.

We have carefully examined the evidence adduced in support of the plea of infancy, and, unless we reject the positive testimony of the father and mother of the principal ¹⁸⁴ defendant, as well as that of herself and husband, we could not find in favor of the complainant on this issue of fact. The only dispute on this point seems to have been whether Mattie O. Dykes was born on the twenty-third day of February, 1869, or on the corresponding day in 1870, and hence whether she was some months over, or some months under, the age of twenty-one years, when the notes and mortgages were executed to the mortgage company and to the loan company. In such a case as this, the evidence will always be closely scrutinized, in order to determine whether the defense of infancy has been dishonestly devised to defeat an honest debt, or whether, in point of fact, the party pleading the disability was under lawful age at the time the contract was made, and hence entitled to avoid the engagement. The defense is one which the law allows, except in certain well-recognized cases; and, if sustained by that measure of proof which reasonably satisfies an impartial mind of its truth, it becomes a plain duty to give effect thereto, unless it is overcome upon some ground, alleged and proven, which the law declares sufficient to avoid the plea. Besides the positive testimony of the four witnesses named, it appears that the written application for the loan, made in the name of Mattie O. Dykes by her husband on the seventh day of August, 1890, stated her age at that time as twenty years. This is a potent circumstance tending to show, if indeed it does not conclusively establish, that the subsequent assertion of the defendant's minority in October, 1890, was not an afterthought.

The complainant took the deposition of no witnesses upon the question of the age of said female defendant, and, upon this issue of fact, it relies entirely upon what purports to be affidavits of Mattie O. Dykes and of her father, Absalom Payne, made before J. W. V. Manghen, a notary public, on the thirteenth day of October, 1890, in each of which it is stated that she was born on the twenty-third day of February, 1869. These supposed affidavits were not signed by the supposed affiants, but they are simply certificates signed by the notary only, in which he certifies that the supposed affiants made oaths as therein stated. The note of submission shows that these so-called affidavits were offered by the complainant in evidence, and that their execution was proven.

This probably ¹⁸⁵ means no more than that the signature of the notary public to them was proven by some person familiar with his handwriting; certain it is that no deposition was taken to establish that either of said parties actually made such affidavits. Ex parte certificates are not depositions, and, upon objection, are not admissible in evidence. They are hearsay purely. Neither are they such documentary testimony as may, by rule 66 of chancery practice, be proved viva voce at the hearing.

While the agreement of counsel upon the subject of exceptions to testimony could not impose upon the chancellor the duty of searching out legal objections not distinctly made and called to his attention (*Binford v. Dement*, 72 Ala. 491), yet, it will be sufficient, in support of his finding, to prevent our treating as waived a valid objection to the use of ex parte affidavits so patently inadmissible, in lieu of depositions regularly taken. The chancellor doubtless did not consider them, and he will likewise disregard them in weighing the testimony. Hence we cannot find that a contradictory statement tending to impeach two of the witnesses was proven, nor that the principal defendant had made an admission against interest receivable against her as original evidence.

Manghen, the notary, was not examined, and although Absalom Payne testified for the defendant, no predicate was laid by the complainant for the introduction of contradictory statements by him; not an interrogatory having been propounded to him in reference to his supposed affidavit. The same remark applies to the examination of Mattie O. Dykes herself. We could not, therefore, in any view, treat said affidavit of Absalom Payne as an impeachment of him. Thus considered, the testimony shows, without dispute or impeachment, that the female defendant was a minor when she executed the notes and mortgage described in the pleadings.

It is earnestly contended, however, that notwithstanding her minority at the time of the transaction with the complainant mortgage company, she ratified her contract after arriving at the age of twenty-one years, and that by such ratification the contract is now binding upon her. This brings us: 1. To consider the facts of the case, as bearing upon this question; 2. To ascertain what are the correct principles of law applicable thereto; ¹⁸⁶ and 3. To declare the consequences, which necessarily follow, from applying the law to the ascertained facts.

It appears, without dispute and indeed from the testimony of

the defendant herself, that while yet a minor she purchased one hundred and fifty-six acres of land from one James, at the price of seven hundred dollars, which had not been paid when she applied to the complainant for a loan; that she had also executed a mortgage to one Clark for fifteen hundred dollars, upon at least a portion of the lands described in the pleadings, and that she desired a loan from complainant for the express purpose of paying off those claims, which were described in her application as encumbrances or liens upon the lands. It was clearly understood that the mortgage of complainant was to be a first lien, and that the money furnished by it upon the mortgage security was to be applied, as far as was necessary, to the payment of James, for the land purchased of him, and to the satisfaction of the mortgage executed to Clark upon at least another portion of her land. And the money, to the extent of two thousand dollars, was actually used in this way, with the knowledge, consent, and concurrence of said Mattie O. Dykes, to whom James, for the seven hundred dollars received by him, gave a receipt, acknowledging receipt of the purchase price of the land he had sold her. The defendant thereupon retained possession of all of said lands, including that purchased from James, and continued, without dissent or expression of dissatisfaction, to use and enjoy them as owner, after attaining her majority. She sets up in her answer in this case that all said lands belong to her and constitute her separate statutory estate, and in her deposition, given over two years after she became twenty-one years old, she states that the lands are still in her possession and are hers. The bill in this case was not filed until nearly two years after her minority ceased, and although the husband, when possession was demanded of him by complainant's agent in December, 1892, refused to yield, stating in general terms that they had a defense, the first expression of any intention or desire by her to repudiate her contract with complainant, is found in her plea of infancy, interposed to this bill. She has never at any time sought to repudiate her purchase of the James lands. Upon these facts, the question of ratification vel non arises.

It may now be regarded as settled beyond further controversy ¹⁸⁷ in this state that, as a general rule, the contract of an infant, whether executed or executory, is voidable merely. To this there are two exceptions. His contract for necessities is valid and binding to the extent of the just value thereof, and an appointment by him of an attorney is absolutely void: *Flexner v. Dick-*

erson, 72 Ala. 318; Philpot v. Bingham, 55 Ala. 435. There are authorities which deny the last stated exception, but it must now be considered as firmly established in Alabama.

As a result of the voidable nature of an infant's contracts, he has the right, upon arriving at his majority, to repudiate them; so also may he, when his minority ceases, ratify and confirm them; and this without any new considerations: American Mortgage Co. v. Wright, 101 Ala. 658; Sharp v. Robertson, 76 Ala. 343; Shropshire v. Burns, 46 Ala. 108; West v. Penny, 16 Ala. 186; Thomasson v. Boyd, 13 Ala. 419; Jefford v. Ringgold, 6 Ala. 544. If the infant has, during minority, wasted or consumed the consideration which he received for his contract, he is not required, either at law or in equity, to refund it, or its equivalent in money, or to place the other party in statu quo. Some authorities require this, but we have adopted the rule, in accordance with reason and the great weight of authority, that to require restitution from the infant, as a condition to the avoidance of his contract, when he has, during his minority, used or consumed the thing received, so that he has not in his possession or under his control the consideration or its proceeds, would be to deprive him of that protection against his improvidence and incapacity which the law designed: Eureka Co. v. Edwards, 71 Ala. 248; 46 Am. Rep. 314; Craig v. Van Beber, 100 Mo. 584; 18 Am. St. Rep. 569; Englebert v. Troxell, 40 Neb. 195; 42 Am. St. Rep. 665, and authorities there cited.

The right of an infant to avoid his contracts is intended, however, solely for his protection during that period when it may be supposed he is unable, from incapacity or inexperience, to fully protect himself in making agreements, and was never designed to be used as a means of profit to accrue to him after he became of lawful age. So it is that when the infant, upon reaching his majority, yet retains what he received by virtue of his contract, or any substantial portion thereof, or the ¹⁸⁸ proceeds thereof, the rule is quite different, and he may not repudiate or disaffirm his contract except upon condition that he restores or abandons to the use of the other party that which remains in his possession of the consideration received. He will not be allowed as an adult to hold and enjoy the benefit of his contract, and then escape its burdens. This would turn his disability into a weapon of dishonesty. If he comes into a court of equity to be relieved of his contract, he must tender or offer to return so much of the consideration as he actually or constructively retains, and has it in his power to return: Eureka Co. v. Edwards, 71 Ala. 257; 46 Am. Rep. 314;

Manning v. Johnson, 26 Ala. 446; 62 Am. Dec. 732. So, also, if in disaffirmance of the contract he sues at law to recover what he parted with, all claims on his part to that which he received would thereby be abandoned, and, if in existence, would revert to the other party; Jefford v. Ringgold, 6 Ala. 544; Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117. If he interpose his disability as a defense to an action at law or in equity, he could be required, on demand or suit, to account for so much as he retained and held under the contract, until he reached the age of twenty-one: Eureka Co. v. Edwards, 71 Ala. 257; 46 Am. Rep. 314.

Such being the situation of the infant, with a necessary liability, upon disaffirmance, of restoring to the other party or accounting for that which he still retains of the consideration, he may, and often does, prefer, upon reaching his majority, to be bound by his original contract in its entirety, rather than yield up what he has received and still retains. He has the election to be so bound. He has then become an adult, capable of deciding for himself, and he must act as he prefers under the circumstances. It is often necessary to decide when the election to disaffirm must be made, and whether it has, in the particular case, been made within a proper time.

When the infant has parted with property, and has used or consumed during minority all of the consideration received by him, delay in making his election will neither benefit him nor injure others, because he retains nothing and need restore nothing. Hence, under the circumstances, silent acquiescence, unconnected with affirmative acts, for any period short of the statutory bar, when there is room for the operation of the statute, will not amount to a ratification: Hill v. Nelms, 86 Ala. 442, ¹⁸⁹ and authorities cited. But, on the contrary, if a case exists, calling for surrender or restitution, as when he still retains the thing received or a portion thereof, actually or constructively, then time becomes an important element, and he must, within a reasonable time under all the circumstances, give notice, in an appropriate manner, of the exercise of his election to disaffirm; and if he does not do so, but retains the thing received, using and enjoying it as owner, his conduct will be a ratification by acquiescence: Boody v. McKenney, 23 Me. 517. This results for the manifest reason that such retention, enjoyment, and use as owner are incompatible with an intention to surrender or repay—the only condition upon which, under the circumstances, a disaffirmance

will be allowed. Thus it is that retention and possession *vel non* by the infant of the consideration of his contract, upon reaching his majority, will exert an important, if not controlling, influence when it becomes necessary to decide upon what terms and conditions a disaffirmance will be permitted, as also when we come to consider within what time the right of election must be exercised, and by the application of this test all our decisions and many in other states, upon the subject of the disaffirmance of contracts of infants, the terms upon which, and the time within which, the same will be permitted, may be harmonized. In *Thomasson v. Boyd*, 13 Ala. 419, we declared that if "an infant, after he attains majority, continues in possession of lands leased to him, or which have been conveyed to him, in both instances he affirms the contract under which he is in possession." This has been many times so decided, and the rule is applicable to purchases of personal and real property alike: *Henry v. Root*, 33 N. Y. 526, and authorities there cited. The infant cannot, on attaining full age, hold on to the purchase and avoid the payment of the purchase money: *Kline v. Beebe*, 6 Conn. 494; *Boyden v. Boyden*, 9 Met. 519; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Dana v. Coombs*, 6 Greenl. 89; 19 Am. Dec. 194; *Langdon v. Clayson*, 75 Mich. 204; *Young v. McKee*, 13 Mich. 552; *Robbins v. Eaton*, 10 N. H. 562.

Ratification may be made by an express promise, as also by such affirmative acts as selling, mortgaging, or converting to his own use, after attaining majority, the ¹⁸⁰ property purchased or procured, or by paying the interest on the debt contracted, as in *American Mortgage Co. v. Wright*, 101 Ala. 658. Such acts evidence a clear and distinct intention to affirm the validity of the contract, and in such cases the question of time is immaterial. It is equally well settled that a retention and enjoyment, after attaining majority, of the property purchased, as owner will, in the absence of dissent, within a reasonable time, operate as a complete ratification: *Boody v. McKenney*, 23 Me. 517. Nor can there be any such thing as a partial ratification. The contract must be avoided or affirmed as an entirety. If the infant has ratified the contract in part, in any of the ways indicated, it will be treated as imparting validity and binding efficiency to the entire contract and to all its terms: *Aldrich v. Grimes*, 10 N. H. 194; *Overbech v. Heermance*, 1 Hopk. Ch. 337; 14 Am. Dec. 546.

Applying these principles to the facts of the case, we find that **Mattie O. Dykes** did not receive in person, and it was not intend-

ed she should receive, the seven hundred dollars paid to James for the land purchased from him. Without doing violence to the form or substance of the transaction, it may, with truth, be said that the land was the specific consideration received by her for her mortgage contract with the complainant to the extent of seven hundred dollars; or, to state the transaction in another form, it may be said that the land represented the money advanced by complainant to that extent, and, retaining the land, that she remained in constructive possession of a large portion of the consideration of the mortgage, after reaching her majority. The complainant, paying off the James mortgage or purchase money lien, would, under the facts of this case surrounding that payment, succeed, in equity, to James' security, and retention of the land by Mattie Dykes, after majority, would be in recognition of this equitable right of the complainant. That land she has kept, used, and claimed for nearly two years after she became twenty-one years old, and even at a later period claimed it was hers. We are quite clear that she did not disaffirm within a reasonable time, and that she has ratified her purchase of that land, and also the contract with the complainant by which the purchase money was paid to James. This operated as an entire ¹⁸¹ ratification of her mortgage, and it is now binding upon her for the whole amount.

In this view, it makes no difference whether the Clark mortgage was a valid lien on her lands or not. Complainant loaned the money to her to pay that obligation which she recognized as valid, and, if it possessed any infirmity, as having been given for her husband's debt, the complainant had no notice or knowledge thereof. Neither does it matter that she used two hundred dollars in paying field hands, nor that Manghen retained one hundred dollars. All of these sums were procured under a single contract, and we cannot hold that she has ratified a part only of the agreement. She had the election to surrender the James lands, and this might have entirely relieved her of her obligation. We must presume she had a good reason for not doing so, and that she preferred to pay her entire mortgage debt, rather than surrender that land. At all events, upon well-settled principles of law we are not authorized to disregard, we must hold, as we do, that having ratified in part she has elected to affirm all the provisions of her contract and to be bound for the full amount of the mortgage debt.

In this conclusion we are not only supported by well-settled

legal principles, and, what is even better, by sound morality and honesty, but also by the very similar case of *Langdon v. Clayson*, 75 Mich. 204. There a married woman under twenty-one years old purchased land and agreed to pay an outstanding mortgage as a part of the purchase price. To get an extension of the time, she borrowed money from another and gave a mortgage on the land to secure the amount, using it to discharge the debt secured by the assumed mortgage. After arriving at age, she kept the land for more than a year, enjoying the benefit thereof. The court held that she had not only ratified the purchase, and her agreement to pay the outstanding mortgage, but also the manner in which she dealt with that lien and, in consequence, the mortgage she gave in lieu thereof. Nor can the defendant escape the result we have declared upon the plea that she is and was a married woman. Under our constitution, a married woman may purchase property, her right to disaffirm the purchase on account of her coverture being now abrogated ¹⁸² in this state: *McAnally v. Heflin*, 105 Ala. 525. If she may purchase, so also may she ratify a purchase previously made.

Her agreement to pay the loan company for securing the loan was a separate contract, made at a different time, and upon that she is not bound, unless, in point of fact, she was of lawful age when she made that agreement: *Tunison v. Chamblin*, 88 Ill. 378.

The next question which arises is one of pleading, and requires us to decide whether there are sufficient allegations in the bill to authorize the relief to which we have declared complainant is entitled on the facts.

The bill is in the simplest form for the foreclosure of a mortgage. It alleges the execution and delivery of that instrument and the notes, the payment of the money, and the default. It did not, when filed, allege any of the facts which we have declared constituted a ratification, nor was there any amendment introducing them into the case. Although ratification validates the contract, as between the parties, *ab initio*, and the same may be declared on without noticing the ratification (*West v. Penny*, 16 Ala. 186), yet it is settled that where infancy is pleaded the facts constituting ratification are in avoidance of the plea, and must be introduced into the pleadings, in actions at law, by a replication: *Fant v. Cathcart*, 8 Ala. 725; *Fetrew v. Wiseman*, 40 Ind. 148. Under our system of equity pleading, it is not necessary to traverse matter of defense, since our statute silently makes up an issue upon the facts alleged in the answer, (Code,

sec. 3444; *Forrest v. Robinson*, 2 Ala. 215); but this does not dispense with the necessity of alleging, in avoidance of a sufficient plea, sustained by the evidence, those facts which are relied on to overcome the defense. If it becomes necessary to avoid matter set up in the answer by new matter, it should be introduced by amendment of the bill: *Smith v. Vaughan*, 78 Ala. 201; *Lanier v. Hill*, 30 Ala. 111; *Story's Equity Pleadings*, sec. 878. This is in accordance with our oft-repeated declaration that appropriate allegations are as essential to the procurement of relief as adequate proofs. It is always matter of regret when a record is in such condition that a party may not receive that measure of relief which justice seems to demand but we cannot disregard well-settled rules of pleading which are necessary to an orderly¹⁹³ administration of justice: *Thompson v. Campbell*, 57 Ala. 183, 190. The complainant should have amended its bill, and thus presented the issue of ratification. This could have been done by appropriate alternative averments, without necessarily admitting that defendant was in fact an infant, since the complainant would be entitled to the same relief whether it proved a contract made by an adult, or a ratified contract made during infancy. In all the numerous cases we have examined on the subject of ratification, there were appropriate pleadings presenting the facts which were relied on to defeat the defense of infancy, with the exception of two decisions in code states, both of which conceding that ratification was matter in avoidance of the plea of infancy, rested their conclusions upon the peculiar language of the Code of Civil Procedure: *Stern v. Freeman*, 4 Met. (Ky.) 309; *Hodges v. Hunt*, 22 Barb. 150. This will clearly appear from the language used in the Kentucky case, where the court says: "The question is, whether or not, under the old practice, the plaintiff could reply a ratification of the contract in avoidance of the plea of infancy. If he could, he may, under the code, prove the ratification without a reply and without setting it forth in an amended petition."

The chancellor was not authorized, in the absence of appropriate allegations in the bill, to grant complainant relief upon the ground of ratification—the only one which the evidence sustained—and hence a dismissal without prejudice was the aspect most favorable to the complainant which he could properly give his decree, rendered in term time: *Gilmer v. Wallace*, 75 Ala. 220; *Olds v. Marshall*, 93 Ala. 138. His decree, therefore, dismissing the bill without prejudice, was proper and must be affirmed: *Munchus v. Harris*, 69 Ala. 506.

It has been argued that complainant is entitled to relief upon the ground of a supposed estoppel in pais arising out of a false representation or fraudulent concealment by the defendant as to her age. The facts do not justify us in authoritatively deciding the question of law involved in this contention, nor does the bill make a case for its application, even if appellant's argument on this line could be adopted in any event. In view of our conclusion on the other feature of the case, it is not likely this question will be again presented, if there should be ¹⁹⁴ further litigation between the parties. We may say, however, that as far as our investigation has extended, the great weight of authority seems to be in accordance with the rule declared in *Sims v. Everhardt*, 102 U. S. 300, which holds against the appellant's contention, upon this proposition.

Affirmed.

Haralson, J., not sitting.

INFANTS — CONTRACTS — DISAFFIRMANCE — RESTORATION OF CONSIDERATION.—The validity of an infant's contract does not depend upon a ratification thereof by him after his minority ends. It is valid until he, by some act, clear and unmistakable in its character, and within a reasonable time, disaffirms it: *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665, and note; and what is such a reasonable time must be determined from the circumstances of each particular case: *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665, and note; *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837. An infant's deed is not void but voidable: Note to *Englebert v. Troxell*, 42 Am. St. Rep. 676; *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837. The rule that requires an infant who, upon coming of age, repudiates a contract executed by him during his minority, and which has been in whole or in part executed by the adult party thereto, to return the property or consideration received, applies only when the infant has the property or consideration at the time he attains full age. If he has wasted or squandered it during infancy, he can repudiate the contract without making a tender thereof: *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569, and monographic note thereto on contracts of infants; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314. But one seeking to avoid a contract on the ground of infancy will be required to make restitution of that part of the consideration still in his hands when he attains his majority, or when he elects to disaffirm. He cannot repudiate and retain as his own the fruits of the contract still in his possession: *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665, and note; note to *Morse v. Ely*, 26 Am. St. Rep. 264; *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228. It is not necessary for the infant, as a condition to disaffirmance, to return an equivalent for property wasted or squandered: *Bloomer v. Nolan*, 36 Neb. 51; 38 Am. St. Rep. 690; note to *Craig v. Van Bebber*, 18 Am. St. Rep. 687. The coverture of an infant is no bar to the disaffirmance of her deed: Note to *Searcy v. Hunter*, 26 Am. St. Rep. 841; *Sewell v. Sewell*, 92 Ky. 500; 36 Am. St. Rep. 606, and note. The whole subject of the contracts of infants is

profusely discussed in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 573-724.

INFANTS — CONTRACTS — RATIFICATION — RETENTION, AND RESTORATION OF CONSIDERATION.—The contract of an infant may be ratified after reaching the age of majority: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 699; but the ratification of part of a contract ratifies the whole: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 659. Such a contract may be ratified by a retention of the property purchased: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 716-718. As to what acts, generally, do or do not amount to a ratification of an infant's contract, see note to *Craig v. Van Bebber*, 18 Am. St. Rep. 704-716, which also shows at page 701, how and when the plea of ratification should be interposed.

BOOTH v. FOSTER.

[111 ALABAMA, 312.]

ADVANCEMENTS, EQUALIZING, IN PARTITION AMONG HEIRS.—As incidental to a partition among heirs, a court of equity may adjust and equalize advancements; and an alienation by one of the joint owners does not affect this power, as the purchaser is chargeable with notice of all the equities existing between his vendor and the other joint owners.

ADVANCEMENTS—EVIDENCE NECESSARY TO SHOW. An advancement by a parent to a child is not shown without satisfactory evidence of an intention, coincident with the transaction, to treat it as a "portion or settlement in life," as an anticipation of the child's share, if the donor dies intestate; and the party asserting an advancement has the burden of proof.

ADVANCEMENTS—MONEY TO PROCURE RELEASE FROM PRISON.—It is not even *prima facie* an advancement, to a daughter, for a father in law to deed land to a third person, and to use the money received from its sale, in a lawful way, to procure his son in law's release from prison, although this is done at the daughter's request.

Bill in equity for the sale of lands for partition. It was filed by the complainant and appellee, Henry B. Foster, against Booth and others, respondents. The question on appeal was, whether a certain deed made by William Forrester to one John Snow was an advancement to the former's daughter, Mrs. Robinson, from whom the complainant derived title. The chancellor decreed that the complainant was entitled to the relief prayed for, and the respondents appealed.

Hargrove & Van de Graaff, for the appellants.

Fitts & Fitts, for the appellee.

³¹⁵ **BRICKELL, C. J.** William Forrester died intestate, owing no debts, leaving six heirs at law. At the time of his death, he was seised in fee of one hundred and sixty acres of land situ-

sted in Tuscaloosa county, and which descended to his heirs. One of the heirs, Mrs. Jennie Robinson, with her husband, executed, after the death of William Forrester, a conveyance to the complainant, Henry B. Foster, of all her right, title, and interest in the said lands, and the bill was filed for a sale of the lands for partition between himself and the other heirs, on the allegation that the property could not be equitably divided without a sale.

The heirs (with the exception of Mrs. Robinson, who, having conveyed, was not made a party) filed a joint answer in which the averments of the bill were substantially admitted. It was averred, however, that the decedent had, in his lifetime, conveyed to one Snow, for the benefit of his daughter, Mrs. Robinson, a tract of forty acres of land, with the understanding and agreement that it should be treated as an advancement, and should be in satisfaction of all her right and interest in his estate. The answer was made a cross-bill, and it was prayed that the deed from Mrs. Robinson and her husband to the complainant might be ordered given up and canceled.

It was held in *Marshall v. Marshall*, 86 Ala. 383, that, as incidental to a partition among heirs, a court of equity might adjust and equalize advancements. An alienation by one of the joint owners cannot, of course, affect this right. The purchaser is chargeable with notice of ^{§16} all the equities existing between his vendor and the other joint owners.

The only question admitting of serious contention is whether the sum received by William Forrester from Snow as the purchase price of the forty acres sold him was an advancement to the daughter, Mrs. Robinson. The evidence may, perhaps, sustain the conclusion that while the money was procured by the ancestor, at the request of the daughter, Mrs. Robinson, it was not used to pay a debt for which she was in any wise bound, nor was it used for a purpose which, in a legal sense, was of any benefit to her. Her husband was in prison and the money was used in a lawful way by his father-in-law to procure his release. Such a transaction cannot be said *prima facie* to constitute an advancement. To treat it as "a portion or settlement in life" would be an unwarranted extension of our statute: Code, sec. 2930; *Fennell v. Henry*, 70 Ala. 486; 45 Am. Rep. 88.

We will not say that if it was clearly shown that such was the intention of the parent an advancement might not result. But the burden in this record is, as we have said, upon the complainants in the cross-bill, in the first instance, and was not discharged or

shifted by proof of the facts we have stated. The evidence, in such case, must go further and show satisfactorily an intention coincident with the transaction to treat it as a "portion or settlement in life"; as an anticipation of the daughter's share of the donor's estate, if he died intestate. There was not probably any well-defined intention in this respect, in the mind of the donor, at the time of the transaction, and that is the period of time at which it must have existed. After a careful consideration of the evidence in the record, we conclude, with the chancellor, that the proof does not reach this point.

It results that the decree of the court below is affirmed.

AN ADVANCEMENT is the giving, by anticipation, of the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement. It is a question of intention, and the burden of proof devolves upon the party claiming the advancement to show that it was made: See monographic note to *Miller's Appeal*, 80 Am. Dec. 559-565. A deed of lands by a father to his daughter's husband is not presumed to be an advancement to the daughter, and so of money paid by the father as surety for the husband: *Rains v. Hays*, 6 Lea, 303; 40 Am. Rep. 89.

THORINGTON v. HALL.

[111 ALABAMA, 323.]

DEVISE — VESTED REMAINDER—DIVESTITURE.—Under a will devising land to the testator's widow, during her widowhood, to be immediately divided, upon her marriage, into four equal parts, one to go to his wife and the other three at once to his three sons, or the survivors or survivor of them; but which will gives the wife power and authority, in case of her death unmarried, to dispose of the land, by her will, to the sons, or the survivors, in such shares or proportions as she may think proper; and, in the event of her death without exercising such power of appointment, the estate to go to the three sons, share and share alike, or to the survivors or survivor of them; each son takes a vested remainder in the land subject to divestiture, as to any one of them, by his death before the falling in of the preceding estate in the widow, and as to all of them by the exercise, in the prescribed manner, of the power of appointment conferred upon the widow by the will, and subject, also, to open and let in the widow, in the event she should marry again; or it may be subject to divestiture, as to one-fourth part of the estate, by her marriage.

DEVISE — VESTED REMAINDER — AGREEMENT BETWEEN REMAINDERMEN TO CHANGE TERMS OF WILL.—If land is so devised, with words of survivorship, that each of three sons of the testator takes a vested remainder in the land. It is competent for them to stipulate, among themselves, against the divestiture of that estate by the death of any one or more of them; and an agreement, among them, that the will may be construed to mean that, if either should die, leaving children, they shall take the same

share that their deceased parent would have taken had he lived, has the effect of eliminating from the will the limitation as to survivorship of the three sons; and, upon the death of one of the sons, his remainder in fee in the land vests at once under such an agreement, in his heirs at law, and they can maintain ejectment to recover the interest.

WILLS—POWER OF APPOINTMENT—INVALID EXERCISE OF.—If a power of appointment in a will is restricted to particular children of the testator by name, it cannot be exercised by the appointment in favor of grandchildren of the testator. Such an exercise of the power is invalid.

Statutory action of ejectment, brought by the appellants, J. Winter Thorington, Bessie M. Thorington, and Jack Thorington, against the appellee, Bolling Hall, to recover possession of an undivided one-third interest in certain specifically described lands. Issue was joined on the plea of not guilty. The ancestor of the plaintiffs, Jack Thorington, senior, died, in 1871, seised and possessed in fee of the land sued for, and left surviving him his widow, Mary L. Thorington, and his three sons, Robert D., Jack, and William S. Thorington. Robert died after his father but before the death of his mother, and the plaintiffs were the only children and heirs at law of Robert D. Thorington. Jack Thorington, senior, left a will which was probated. All of his property was given, by this will, to his widow for life or widowhood. The sixth item of this will was as follows: "If my wife shall not marry again, it is my will and desire she shall have the power and authority, and she is hereby invested therewith, to dispose of all the estate and property she may have, or die possessed of, or be entitled to, by her will, to our beloved children, Robert D., Jack, and William S., and in such shares and proportions to them, or the survivors, and under such safeguards in trust, or otherwise, as, under the circumstances then existing, she may deem just and wise, and best for them; and, in the event of her dying intestate, the said estate and property to be distributed to our said three children equitably, and share and share alike, or to the survivors or survivor of them." The seventh item of the will was as follows: "It is my will and desire that should my wife marry again, that in that event there shall be an immediate division of all my estate into four equitable parts or shares, one of which shares shall be retained by my wife and the three other parts or shares shall be immediately paid over to my said children, Robert D., Jack, and William S., or the survivors or survivor of said children." On August 28, 1881, after the will had been probated, the three sons of the testator, being then of age, entered into a written agreement, wherein it was recited that, from declarations

made by their father in conversation with them, both before and after the making of the will, and also other facts within their knowledge, they were satisfied that the sixth and seventh items of their father's will, through inadvertence, did not correctly express his will, that he did not use the words, "survivors or survivor," as they appeared in such items, in their legal and technical signification, and that he did not intend, by these words, to exclude from sharing in his estate a child or children of such of his sons as might die before the others, leaving a child or children. The agreement set forth the sixth and seventh items of the will, in *haec verba*, and contained the provision stated in the opinion. The widow, Mary L. Thorington, took possession of the land sued for, as a part of her deceased husband's estate, and held it until her death, in 1890. She left a last will and testament which was admitted to probate. Upon her death, the executors took possession of the land, and held it until November 24, 1890, when it was sold and conveyed, under a power of sale given them by the will, to the defendant, Hall, who received a deed to it. After that time, Hall held the land and received the rents, income, and profits therefrom. The court gave the general affirmative charge for the defendant, and the plaintiffs appealed.

W. A. Gunter, for the appellants.

Troy & Watts, for the appellee.

³²⁰ McCLELLAN, J. 1. Under the will of Jack Thorington, Sr., his sons, Robert D., Jack, and William S., each took ³³⁰ a vested remainder in the land involved in this case subject to divestiture as to any one of them by his death before the falling in of preceding estate in Mrs. Thorington, and as to all of them by the exercise in the prescribed manner of the power of appointment conferred upon her by said will, and subject also to open and let in Mrs. Thorington, in the event she should marry again; or, it may be, subject to divestiture as to one-fourth part of the estate by her marriage, whereon there was to be a division in equal parts to her and the three named sons severally of the testator: *Smaw v. Young*, 109 Ala. 528; *Thorington v. Thorington*, 111 Ala. 237.

2. Each of the said three sons of the testator having thus a vested estate in this land, it was entirely competent for them to stipulate, as among themselves, against the divestiture of that estate as to any one or more of them by their deaths, respectively. They did so contract and stipulate by the agreement, of August, 1881, whereby it is provided, agreed, and cov-

enanted between them that, as they express it, the said will of their father "may be taken and construed so that if either the said Robert D., Jack, or William S. should die leaving a child or children, that then, in that event, such child or children shall take the same share and interest in our father's estate as its or their deceased father would have taken had he lived, the object and intent of this agreement being to cause said will to have the same legal operation and effect that it would have if the words 'or the survivors' and the words 'or the survivors or survivor of them' in the sixth item, and the words, 'or the survivors or survivor of said children' in the seventh item, were not contained in said will." This agreement is expressly referred to, recognized, assented to, and adopted in and by the will of Mrs. Thorington; and its effect, for the purposes of the present case, was to eliminate from the will of Jack Thorington, Sr., all reference to the survivors or survivor of his said three sons, so that upon the death of Robert D. Thorington his remainder in fee in the land sued for vested at once in his heirs at law, the plaintiffs in this action.

3. We have left for determination only the question whether the remainder thus vested in the plaintiffs was divested by the exercise of the power of appointment conferred upon Mrs. Thorington by the will of her husband, ³³¹ Jack Thorington, Sr. With the limitation as to survivorship eliminated from said will in the manner shown above, and the assent to and adoption of that elimination by Mrs. Thorington in and by the instrument in which she attempted to exercise the power of appointment—her last will—the power of appointment, conferred by the will, of Mrs. Thorington is to be taken and read as follows: Item Sixth. It is my will and desire that my wife shall have the power and authority, and she is hereby invested therewith, to dispose of all the estate and property she may have, or die possessed of, or be entitled to, by her will, to our beloved children, Robert D., Jack, and William S., and in such shares and proportions to them, and under such safeguards in trust, or otherwise, as under the circumstances then existing, she may deem just and wise and best for them. And the question is whether, under a power thus expressed and conferred, it was competent for Mrs. Thorington to appoint said estate to Jack and William S. who survived her, and to the surviving children of Robert D., the latter having died before the execution of Mrs. Thorington's will, as she attempted to do by her last will in the following language: "Item second. I give, devise, and bequeath all property of every kind whatsoever of

which I may die seised or possessed, or to which I may then be entitled in any manner whatsoever, to my sons, Jack Thorington, Wm. S. Thorington, and the children of my deceased son, Robert D. Thorington, viz., Joseph Winter Thorington, Bessie May, and Jack, in the following proportions, to-wit: To my son Jack Thorington, one-third part thereof; to my son William S. Thorington, one-third part thereof, and to the said children of my said deceased son Robert D., one-third part thereof, in trust, as hereinafter provided."

Confessedly, at common law an appointment under this power to granchildren of the testator—the children of Robert D. Thorington—would be void. But it is insisted that section 1862 of the code operates in this case to authorize the appointment made by Mrs. Thorington to and among Jack, William S., and the children of Robert D., deceased. That section provides: "When a disposition under an appointment or power is directed to be made to the children of any person, without restricting it to any particular children, it may be exercised in favor ³³² of the grandchildren or other descendants of such person." This section has no application in the present case. The exercise of the power is here restricted to particular children of the testator by name, Robert D., Jack, and William S. Thorington. Whether, if it were made to appear that these three named children were all the children of the testator, the statute would apply to the case, we need not decide, since it does not appear upon the abstract that such was the fact. It would seem, however, to be an essential predicate for the operation of the statute that the children should be for appointment to and among children as such and as a class, and that a direction for appointment even to all the children of the testator by name would be such restriction to particular children as would take it out of the influence of the enactment. The case of *Collins v. Toomer*, 69 Ala. 14, relied on by counsel for appellee, is not only not inconsistent with our conclusion on this matter, but, to the contrary, supports it.

It follows from the invalidity of the attempted exercise by Mrs. Thorington of the power of appointment conferred by the will of Jack Thorington, Sr., that the plaintiffs, at her death, took an undivided one-third interest in right of immediate possession and enjoyment in the land sued for and were entitled to recover such interest in this action. The court, therefore, erred in giving the affirmative charge for the defendant.

Reversed and remanded.

DEVISE—VESTED REMAINDERS.—Under a devise to a wife for life, with remainder to certain named children, and with a subsequent provision that if any of such named children die before the wife, then the property is to be equally divided between the survivors, the devise of the remainder is to certain definitely specified individuals, who, as remaindermen, already answer the description by which they are to take, and there is no obstacle to supposing an immediate vesting to have been intended: *Ducker v. Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135. In cases of vested remainders, a present interest passes to a fixed person, or class of persons, to be enjoyed in future: Note to *McIlhinny v. McIlhinny*, 45 Am. St. Rep. 194. If a testator gives all his property to his wife during her life or widowhood, and provides that, on her marriage or death, the whole shall be equally divided among his children, each child takes a vested transmissible interest, and the administrator of any child who dies in the lifetime of the widow will, on the falling in of the life estate, be entitled to the share which his intestate would have taken had he survived the tenant for life: *Bentley v. Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523.

POWER OF APPOINTMENT IN WILL.—If a testator gives a life estate, with a general power of appointment of the inheritance, and in case of a failure to appoint, gives the estate to other parties, the latter take a vested remainder subject to be defeated by the exercise of the power, and not an executory devise: Note to *Johnson v. Cushing*, 41 Am. Dec. 705.

McKAY v. SOUTHERN BELL TELEPHONE COMPANY.

[111 ALABAMA, 837.]

ELECTRIC WIRES—NEGLIGENCE—PLEADING.—If the complaint, in a joint action against a telephone company and an electric street railroad company, for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, alleges that, known to the defendants, the wire was frail and weak, not securely fastened to the poles, and was liable to break and fall across the trolley wire, and that it was the duty of the defendants to so maintain, guard, and protect their wires as to prevent such an occurrence, a plea of the telephone company that its wire was in good order and condition, and properly located and maintained, is not a denial of the allegations of the complaint.

ELECTRIC WIRES — NEGLIGENCE — INSUFFICIENT PLEA.—In a joint action against a telephone company and an electric street railroad company for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, and which damages were alleged to have been caused by the defendants' negligence, a plea of the telephone company, confessing that, after the telephone wire fell across the trolley wire, and extended to the ground, charged with the dangerous current of electricity, both defendants allowed it to remain in that condition, causing the plaintiff's injury, is insufficient, and a demurrer to it should be sustained.

ELECTRIC WIRES—CONTACT OF TROLLEY AND TELEPHONE WIRES—NEGLIGENCE—WHAT IS NO DEFENSE.—In

a joint action against a telephone company and an electric street railroad company, for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, it is no defense, on the part of the railroad company, that it had lawful authority to construct and operate its road with the motive power employed, where it, with knowledge that a frail, weak, insecurely fastened telephone wire, liable to fall across its trolley wire, and extend to the ground, charged with a deadly current of electricity, thus imperiling life and property along the highway, was maintained by the telephone company; took no steps to avoid destructive consequences, and allowed the telephone wire, after it had fallen, to remain lying across its trolley wire, extending to the ground, thus injuring the plaintiff's property.

ELECTRIC WIRES—DUTY OF STREET RAILROADS AS TO CONDITION OF TROLLEY WIRES—NEGLIGENCE.—Although an electric street railroad company erects and maintains its trolley wire in the manner that other trolley wires are erected and maintained by many prudent and well-managed electric railway companies, conducting the same character of business over and along the streets of other cities, it is negligent where it knowingly suffers a wire of a telephone company to be suspended over its own, in a condition likely to fall across its own, involving danger to persons and property on the street, without providing proper safeguards; or where, after the fall of such wire across its own, the railroad company allows it to remain in that condition.

JOINT LIABILITY—NEGLIGENCE—CONTACT OF TROLLEY AND TELEPHONE WIRES.—If an electric street railroad company and a telephone company concurrently maintain two wires, so related to each other, and so erected, that one is likely to fall across the other, and occasion damage to animal life or property, it is the common duty of both companies to abate the dangerous condition, where the danger is within the concurrent, common knowledge of both parties, and they are jointly liable for injuries occasioned by a contact of the wires, especially where they allow them to remain in that condition.

PLEADING — GENERAL ISSUE—WAIVER OF FORMAL PROOF.—While the plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiff the necessity of proving them, the defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof, and, in such a case, it should be left to the jury to say whether it is waived or not.

Action brought by the appellants, McKay & Roche, against the appellees, the Southern Bell Telephone & Telegraph Company and the Mobile Street Railroad Company, to recover damages for the alleged negligent killing of plaintiffs' horse and the injury of another horse, and for injuries to the harness on them. The complaint contained three counts. The defendant, the Mobile Street Railroad Company, pleaded the general issue, and also several special pleas, to which demurrers were interposed. The nature of the pleas may be gathered from what is said of them in the opinion. The court overruled the demurrers to each of the pleas.

of both of the defendants. The plaintiffs filed replications to the pleas of each of the defendants. The evidence tended to show that the damage was done by the electricity with which the telephone wire was charged from its contact with the trolley wire. An ordinance of the city of Mobile, providing for a method of erecting light, motor, or power conductors where they approached or crossed the line of any fire alarm or police telegraph, telephone or telegraph line in that city, was offered in evidence by the plaintiffs, but the railroad company objected, on the ground that it was immaterial, irrelevant, and incompetent. The objection was sustained. The defendants offered no evidence. The court gave the general charge in behalf of each defendant. There was a judgment for the defendants, and the plaintiffs appealed.

L. H. Faith, for the appellants.

Russell & Deshon, for the Southern Bell Telephone & Telegraph Company.

Gregory L. & H. T. Smith, for the Mobile Street Railroad Company.

349 HEAD, J. This is a joint action against the two appellees for damages to property alleged to have been caused by their negligence. The contest seemed to have been largely waged by and between the two defendants, each accusing the other, but the result was victory to both over the plaintiffs.

The complaint shows that the Mobile Street Railroad Company operated an electric street railway along Government street, in Mobile, with the electric motive power supplied by means of an overhead trolley wire, such as is generally in use, which wire was so heavily charged with electricity as to render contact with it highly dangerous to animal life. It was suspended from poles over the middle of the street, in the usual way. Government crossed Lawrence street. The telephone company had, suspended from poles, along Lawrence crossing Government, as such wires are usually suspended, a wire which it used in its telephone business. This was stretched a few feet over and above the railway trolley wire, which it crossed. The complaint charges, in the first count, that this was a frail, weak wire, and was not securely fastened upon its poles, and was liable to break and fall upon and across the said trolley wire, and to extend down to the ground, heavily charged with electricity by reason of its contact with the trolley wire, and thereby become exceedingly dangerous to the lives of all persons and animals passing upon and along

said streets, all of which were well known to both defendants; that it was the duty of the defendants, respectively, to so maintain, guard, and protect their said respective wires as to not allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, and become charged with electricity from the latter; yet it is averred that, at the time of the injury complained of, the defendants failed and neglected so to do, whereby the telephone wire, which broke, fell across the trolley wire and extended to the ground heavily charged with electricity communicated from the trolley wire, and with which plaintiff's two horses, while being driven along Government street by plaintiff's servant, ³⁵⁰ came in contact, producing electric shocks, which killed one of them and seriously injured the other, and did injury to the harness. The second count charges the negligence of the defendants to have been that they "wrongfully and negligently suffered said telephone wire to fall upon and across said trolley wire, and extend therefrom down to the ground, heavily charged with electricity from said trolley wire, and to be and remain in that condition." The third count charges that the negligence consisted in suffering the telephone wire to be and remain lying upon and across the trolley wire and extending down therefrom to, upon, and across Government street . . . heavily charged with electricity from the said trolley wire. There were demurrers to these several counts, which were overruled.

The defendants filed separate pleas. The telephone company pleaded, first, the general issue. Its second plea, as subsequently amended, set up contributory negligence on the part of plaintiff's driver, upon which issue was joined. Its third plea averred that its wire was in good order and condition; was properly located and maintained, and was necessarily stretched across, over, and above the trolley wire; that it was charged only with such a low current of electricity as to be harmless to life or property brought into contact with it. The nature, and dangerous electric charge, of the trolley wire, as alleged in the complaint, are repeated, and the plea avers that it was the duty of the railroad company, which it could have performed, to so construct and maintain, guard, and protect its said trolley wire as not to allow contact to be made with it and the telephone wire, if by accident, the latter should fall where it crossed the former; yet the plea avers that the railroad company failed and neglected so to do, whereby, when the telephone wire did fall, it fell across the trolley wire, and communicated the electric current of the latter to plaintiff's

horses, doing the injury complained of by the plaintiffs. The fourth plea sets up the failure of the railroad company to obey an alleged lawfully authorized order or direction of the mayor of Mobile requiring it, and all other companies using trolley wires, to guard and protect them by what is known as "guard wires." It avers that that company, by compliance with said order, in the construction of such guard wires, could have ^{so} protected its trolley wires, that, in case the small telephone wire should fall, it would not come in contact with the trolley wire; and this failure is charged to have been the direct cause of plaintiffs' injury. The fifth plea is substantially the same as the third, with the additional averment that the telephone company was established and in operation along Lawrence street, crossing Government, before and at the time the railroad company constructed its road and erected its trolley wire. The sixth plea is substantially the same as the fifth, with an additional averment of municipal authority for the construction and operation of its telephone lines.

As we have seen, the complaint contains several charges of negligence against both defendants: 1. That the telephone wire was frail and weak, and not securely fastened to the poles, and was liable to break and fall across the trolley wire, etc., which facts were known to both defendants; and that it was the duty of defendants, respectively, to so maintain, guard, and protect their respective wires as not to allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, etc., showing failure to observe these duties, with the resultant injury; 2. That defendant wrongfully and negligently suffered the telephone wire to fall upon and across the trolley wire, etc., and to be and remain in that condition; 3. That they suffered the telephone wire to be and remain lying upon and across the trolley wire, etc.

It is plain that neither the third, fourth, fifth, nor sixth pleas of the telephone company answers either of these charges. The third does state that the telephone wire was in good order and condition, and properly located and maintained, but this cannot be accepted as a denial of the allegations that, known to the defendants, it was frail and weak, not securely fastened to the poles, and liable to break and fall across the trolley wire; and that it was the duty of the defendants to so maintain, guard, and protect their wires as to prevent such an occurrence. Nor is it excuse to the telephone company, derelict in these respects, that the railroad company was guilty of the negligence charged in its

several pleas. These allegations but emphasize the averments of the complaint, and accentuate the charges of the telephone company's own neglect. The fourth plea is, perhaps, more vicious ³⁵² than the third. It shows the violation, by the railroad company, of a lawful order of the mayor to erect guard wires to prevent just such catastrophes as now brought to view; and yet it confesses that the party pleading maintained a weak, frail wire, insecurely fastened, and, as known to both defendants, liable to fall across the trolley, and violated a duty to protect it against such consequences. And, more than this, it confesses that the party pleading, as well as its codefendant, after the wire fell across the trolley wire, extending to the ground charged with the dangerous current of electricity, suffered it to be and remain in that condition, causing the plaintiff's injury. The same may be said of the fifth and sixth pleas. The demurrers sufficiently raise these objections, and the court erred in overruling them.

It is apparent there is no answer, in either of the special pleas of the defendant, the Mobile Street Railroad Company, to either of the charges of negligence contained in the complaint. It is not material to this controversy that the company had lawful authority to construct and operate its road, with the motive power employed. It does not appear, unless by the statement of a conclusion of the pleader merely, that the charter and municipal ordinance authorized the defendant, knowing that a frail, weak, insecurely fastened telephone wire, liable to fall across its trolley wire, and extend to the ground, carrying a deadly current of electricity to persons and property lawfully passing along the highway, was being maintained by another, to maintain and operate its own wire without taking any steps to prevent destructive consequences; and particularly does no authority appear to suffer the wire of the telephone company to be and remain lying across its own, extending to the ground. Nor is it material that the defendant had no connection with the telephone company, and that the latter's wire broke and fell without the defendant's fault, and that it did nothing to cause it to break and fall as it did. Nor does the fact that defendant erected and maintained its wire in the manner that other trolley wires are erected and maintained by many prudent and well-managed electric railway companies, conducting the same character of business over and along the streets of other cities, justify it in knowingly suffering a wire to be suspended over its own in a condition likely to fall across ³⁵³ its own, with attendant dangers mentioned without provid-

ing proper safeguards; or, after its fall, suffering it to be and remain in that condition. The demurrers to these pleas ought to have been sustained.

It is said that the pleas are good in that they show there was no joint liability of the defendants. The injurious act complained of consisted, in one aspect of the complaint, in the concurrent maintenance of two wires, so related to each other, and so erected, that the one was likely to fall across the other, producing the dangers charged. This wrong was within the concurrent, common knowledge, contemplation, and intent of both defendants. Both knew that the one wire was likely to fall across the other, and cause such damage as the plaintiff sustained, it was the common duty of both to abate the dangerous condition. It is not material by what special act or omission on the part of either, in the maintenance of its own wire, the dangerous condition was produced. So far as concerned the public, it was the maintenance of the two wires, so related to each other, in respect of injurious consequences, that they were inseparable. Known to both defendants, the two wires mutually depended upon each other for those consequences. Whether the condition was primarily brought about by the neglect of the one or the other, or both defendants, it yet existed with knowledge on the part of both, and both contributed to the continuance of its existence. The supreme court of Tennessee, in *Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614, had occasion to consider a case substantially identical with this. The opinion being short, we reproduce it, as delivered by Turney, C. J., as follows: "Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident the telephone wires crossed the railway track above the trolley wire, and, while resting on it, the horse came in contact with it, and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge without the intervention of a jury. The condition of the ³⁵⁴ telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty

of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley wire was in like manner protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley wire, and the consequences of a contact of the wires of the one with those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable."

It is unnecessary to discuss the joint liability of the two defendants, under the phase of the complaint which charges that they suffered the wire of the one, after falling, to be and remain across and in contact with that of the other, causing the injury. It is too clear for discussion that such liability is joint. The pleas were interposed to the whole complaint.

The special replications bring forward nothing new, and were improperly interposed. They might well have been stricken from the file. They will, probably, not be insisted upon.

There does not appear to have been any real question upon the trial as to the operation of the railway and telephone lines by the defendants, respectively; and the plaintiffs omitted to make direct proof thereof, at least as to the telephone company. There is clearly sufficient ³²⁵ evidence, howsoever weak, to send the question to the jury as to the operation of the railroad by the Mobile Street Railroad Company at the time of and for months prior to the injury, and to authorize an inference by the jury of a failure of duty, as alleged, on the part of the company, proximately causing the injury. As to the telephone company, there was evidence tending to show that a telephone wire was being and had been, for months before the injury, maintained as alleged in the complaint, and that it fell across the trolley wire as alleged. The defendant, the Southern Bell Telephone & Telegraph Company being sued and charged with maintaining

the wire, came into court, by counsel, and entered upon a trial of the general issue, as well as of special issues. So, also, as to the other defendant, the Mobile Street Railroad Company. The conduct of the trial by these defendants from beginning to end; the character and manner of the development and production of the testimony, the cross-examination of the plaintiffs' witnesses, the absence of a suggestion, express or implied, in the conduct of the trial on the facts, that any other than the defendants maintained and operated the wires, respectively—all tended to show an implied admission that they were the parties, and authorized the jury so to infer. It is certainly true that the plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiff the necessity of proving them; but the rule is a reasonable one. No set form of proof is prescribed. The defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof; and, in such a case, it should be left to the jury to say whether it is waived or not. Suppose an extrajudicial investigation, of precisely the same nature and incidents as the trial in question, had occurred by and between the parties to this suit, in reference to this subject; would not the conduct of the defendants thereon be admissible, upon a subsequent judicial investigation of the matter, to authorize the inference of an implied admission that they were the parties who maintained the wires? We think so. We will not, therefore, declare that the rulings upon the pleadings were erroneous without injury.

²⁵⁶ The city ordinance which was excluded, may be so connected on another trial as to render it admissible, if it was not on the trial appealed from. Reversed and remanded.

ELECTRIC WIRES — NEGLIGENCE — DAMAGES.— Telephone and other corporations and persons using electricity in the public streets owe a duty to all persons lawfully using such streets that the use shall be substantially as safe as before the telephone or other electric plant was placed therein: *Western Union Tel. Co. v. State*, 51 Am. St. Rep. 464; *City Electric etc. Ry. Co. v. Conery*, 61 Ark. 381; 54 Am. St. Rep. 262. A company or person using wires to convey electricity is required to use very great care to prevent injury to persons or property: *Giraudi v. Electric Improvement Co.*, 107 Cal. 120; 48 Am. St. Rep. 114; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786; *Huber v. La Crosse City Ry. Co.*, 53 Am. St. Rep. 940; *City Electric etc. Ry. Co. v. Conery*, 61 Ark. 381; 54 Am. St. Rep. 262; and this independent of statutory regulation: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; 32 Am. St. Rep. 348. Proof that there was a live wire carrying a deadly current of electricity down in the public streets raises the presumption that

• some one has failed in his duty to the public: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786. For any negligence respecting its trolley wire, charged with a powerful current of electricity, whereby that current escapes through any other conductor brought in contact with the trolley, a street railway corporation is answerable to a person injured in the public streets and guilty of no culpable neglect contributing to his injury: *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381; 54 Am. St. Rep. 262; showing when the jury is warranted in drawing the inference that a telephone wire had become charged with a strong current of electricity by coming in contact with a trolley wire. So telegraph and telephone corporations are answerable in damages to a person injured by a wire suspended from one of their poles by their permission, and which becoming broken, falls across the feed wire of an electric railway company, and remains there two weeks, and, becoming charged with electricity, is thrown against a person lawfully using a public street, inflicting on him great personal injury: *Western Union Tel. Co. v. State*, 82 Md. 293; 51 Am. St. Rep. 464, and note. An electric railway, however, having taken reasonable and proper precautions, is not answerable for an injury caused by a contact of wires, where it is a consequence which the corporation could not reasonably anticipate: *Huber v. La Crosse City Ry. Co.*, 92 Wis. 636; 53 Am. St. Rep. 940. So it is not answerable for an injury resulting from a telephone wire falling and coming in contact with its trolley wire, unless a man of ordinary intelligence and prudence, engaged in operating the street railway in question, ought to have reasonably expected that the telephone wire would be likely to come in contact with its trolley wire at the place in question, and occasion injury to persons lawfully upon the highway crossed by such telephone wire: *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849.

ELECTRIC WIRES—DUTY OF STREET RAILWAYS TO GUARD TROLLEY WIRES.—It cannot be said, as a matter of law, that it is the duty of an electric railway to place guard wires over its trolley wires in such a way as to prevent telephone wires, in the event of their falling from any cause, from falling upon and coming in contact with the trolley wire, but it should be left to the jury, under all the facts of the case, to determine whether the method actually used was negligent: *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849.

JOINT LIABILITY—CONCURRENT NEGLIGENCE.—When an injury occurs through the concurrent negligence of two persons, and would not have happened in the absence of either, the negligence of both is the proximate cause of the accident, and both are answerable: *City Electric etc. Ry. Co. v. Conery*, 61 Ark. 381; 54 Am. St. Rep. 262.

PLEADING.—THE GENERAL ISSUE puts the plaintiff on proof of every material averment of his complaint: *Swift v. Tatner*, 89 Ga. 660; 32 Am. St. Rep. 101.

ELLIOTT v. KITCHENS.

[111 ALABAMA, 546.]

PLEADING—SUBSTANTIAL CAUSE OF ACTION.—Each count of a complaint that will support a judgment by default contains a substantial cause of action.

PLEADING—DEMURRER—DETERMINING MEASURE OF DAMAGE.—A demurrer is not the proper method of determining what is a proper measure of damage. Hence, if the complaint shows a wrong committed by the defendant, actionable in favor of the plaintiff, it is good, although nominal damages only may be recoverable; and the insertion of a claim of special damage, not legally recoverable, would not be a cause of demurrer.

ANIMALS—"RUNNING AT LARGE," WHAT IS.—A colt about three months old, running along directly in front of, and by the side of, its dam, which is hitched to a wagon and is being driven through the streets of a city, is not "running at large," within the meaning of an ordinance prohibiting horses from running at large on the streets.

Action to recover damages to a horse and wagon occasioned by allowing a vicious horse to run at large. It was brought by the appellant, Elliott, against the appellee, Kitchens, and was commenced before a justice of the peace, where the plaintiff obtained a judgment. The defendant appealed to the circuit court. The complaint contained two counts. The defendant demurred to each count, and to the whole complaint, but these demurrers were overruled, and the defendant then filed three pleas, upon which issue was joined. The main question decided arose under the second plea, which was as follows: That, at the time of the alleged injury, there was an ordinance in force, in the city of Jasper, making it unlawful for any horse or mule to run at large on the streets, or parks, or alleys of the city of Jasper; that said alleged injuries occurred in the corporate limits of the city of Jasper; and that, at the time the colt was so chased or worried, it was running at large on the streets, avenues, or parks, or alleys of the city of Jasper. It was shown that the plaintiff's mare was injured and that his wagon was broken. The ordinance of the city was put in evidence. The court gave the general affirmative charge for the defendant. There was a judgment for the defendant, and the plaintiff appealed, assigning, as error, the giving of such charge.

T. L. Sowell, for the appellant.

Coleman & Bankhead, for the appellee.

548 HEAD, J. Each count of the complaint contains a substantial cause of action. In other words, it would support a

judgment by default. This is true upon the ⁵⁴⁹ facts stated, without regard to the legal effect of the ordinance mentioned in the second count, upon the plaintiff's right of action. The sufficiency of the counts upon demurrer is not before us, and we cannot properly pass upon the questions touching that subject, discussed by appellant's counsel. We will remark, however, that it is well settled that demurrer is not the proper method of determining what is a proper measure of damage. If the complaint shows a wrong committed by the defendant, actionable in favor of the plaintiff, it is good, although nominal damages only may be recoverable. The insertion of a claim of special damage, not legally recoverable, is not cause of demurrer. We notice that the first count claims no special damages at all. Under that count there could be no recovery of more than nominal damages. The second count claims for injuries to the wagon and mare, which would let in proof of those injuries.

The question arises under the defendant's second plea, whether the plaintiff's colt was "running at large" within the meaning of that allegation of the plea; for if that allegation was proven the defendant was entitled to the general charge which the court gave—the plaintiff having joined issue on the plea. At the time of the injury the colt was about three months old, and was following its dam, then being driven by plaintiff to a wagon through the streets of Jasper: In 12 American and English Encyclopedia of Law, 898, we find the following: "Running at large," in statutes imposing a penalty on one who suffers animals to run at large in public places, is used in the sense of strolling without restraint or confinement; as wandering, roving, or rambling at will, unrestrained. Perhaps, no abstract rule under the statute can be laid down, applicable to every case, as to the nature, character, and amount of restraint necessary to be exercised over a domestic animal when suffered to be on the highway incident to its use. But the restraint need not be entirely physical; it may depend much upon the training, habits, and instincts of the animal in the particular case; and the sufficiency of the restraint is to be determined more from its effect upon, and controlling and restraining influence over, the animal than from its nature or kind." In a note, the following quotation from *Russell v. Cone*, 46 Vt. 604, is given: "Suppose a span ⁵⁵⁰ of horses be so accustomed to be kept and driven together that while the owner is riding one the other will voluntarily follow as closely almost as if led by a halter; the owner while taking them along the highway in this manner could not be said to suffer the horse so volun-

tarily following its mate to run at large in violation of the statute. The same may be said of a young suckling colt upon the highway, with no restraint other than instinct to follow its dam, which is being driven in a carriage on the highway." It was accordingly held that a horse accustomed to be ridden to a certain point by the owner, and then to return home alone to a point where the owner's boy was waiting for him and took care of him, was not "running at large," if his owner or his son kept so near that, owing to its training, it would not wander about the highway, but go directly home. A number of other authorities are quoted from in the notes stating similar principles. Thus, a dog following his owner, or engaged in the chase, is not "running at large." The case of *Smith v. Kansas City etc. Ry Co.*, 58 Iowa, 622, is stated as follows: "A suckling colt, followed its mother, which was in the plaintiff's control, strayed and was injured by defendant's train. Held, that the colt, under such circumstances, must be deemed to have been running at large." "The fact that the colt was a suckling colt and its mother was in the control of the plaintiff did not, we think, hold that the colt was in such control. It might, perhaps, under ordinary circumstances, be expected to follow its mother, but there was nothing but its own inclination to restrict its freedom and prevent it from straying, and we think that it must be deemed to have been running at large." If that case be regarded as sound, it is yet distinguishable from the present. There the colt of its own volition strayed away from its dam, and, when injured, was at large, under no restraint of instinct or otherwise. Here the facts were that the colt was following its dam, and the defendant's horse, loose upon the street, ran after it. The colt ran along directly in front of and by the side of its dam, and plaintiff kept the horse from it by throwing chips and trash at him, which he picked up in the bed of the wagon, until he drove up to the foundry and got out of the wagon, when the horse got in between the colt and its mother and chased it away, causing ⁵⁵¹ the mare to break away from the plaintiff's control and run, with the wagon, after the colt. There was not only the restraint of instinct actually in force at the time of the injury, but there was the physical presence of the owner actually exerting control and protection over the colt.

We are of opinion that, under the facts of this case, and the principles of law above stated, the colt was not running at large within the meaning of the plea, and the ordinance upon which it relies.

The facts were sufficient, in all other respects, to carry the case to the jury. The court erred in giving the affirmative charge for the defendant.

Reversed and remanded.

ANIMALS ARE NOT "RUNNING AT LARGE" when they are in charge of a person directing or controlling their movements: Note to *Stewart v. Hunter*, 8 Am. St. Rep. 272. "Running at large" means strolling without restraint or confinement, or wandering, roving, or rambling at will, unrestrained: *Wright v. Clark*, 50 Vt. 130; 28 Am. Rep. 496.

McGHEE v. WILSON.

[111 ALABAMA, 615.]

HOMESTEAD—HUSBAND'S CONVEYANCE OF RIGHT OF WAY OVER, IS VOID, UNLESS WIFE JOINS.—A husband cannot, without the consent of his wife, grant or alienate a right of way for a railroad across land owned by him and occupied as a homestead by his family. Such a conveyance, made by him, without her consent, by an instrument in writing, in which she does not join, is a nullity and works no estoppel against the husband.

Statutory action of ejectment, brought by A. J. Wilson, the appellee, against C. M. McGhee, Henry Fink, and Samuel Spencer, as receivers of the East Tennessee, Virginia & Georgia Railroad Company, to recover a certain strip of land used by the company as a right of way. The defendants claimed title to the land under a conveyance executed by A. J. Wilson on April 18, 1889, to the Rome & Decatur Railroad Company, and which granted and conveyed a right of way across the land in question. The defendants regularly connected themselves with this deed, and showed possession in themselves and those from whom they derived title after the execution of the deed. The plaintiff's evidence tended to show that, at the time of executing the deed, he owned the land through which he granted the right of way, and occupied it as a homestead, together with his wife, that there were one hundred and twenty acres in the tract, and that his wife did not join with him in the execution of the deed. The plaintiff obtained judgment, and the defendants appealed.

Denson & Burnett, for the appellants.

Dortch & Martin, for the appellee.

617 COLEMAN, J. The appellee, Wilson, instituted the statutory action of ejectment to recover a small strip of land. The material question argued by the appellant is, whether a right of

way granted and conveyed by the husband, by a proper instrument duly executed by him, but in which the wife did not join, over the homestead, is valid and operative as against him. This question has been answered in the affirmative by the courts in Iowa and Texas: *Chicago etc. R. R. Co. v. Swinney*, 38 Iowa, 182; *Ottumwa etc. R. R. Co. v. McWilliams*, 71 Iowa, 164; *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39; *Randall v. Texas Cent. Ry. Co.*, 63 Tex. 586.

In *Lewis on Eminent Domain*, section 589, the text is, that "the husband may make a valid grant of a right of way through lands belonging to him and occupied as a homestead." The above cases from Iowa and Texas are cited in support of the text.

In *Smyth on Homestead and Exemptions*, the author uses the following language in section 303: "The power of the husband to grant right of way over the homestead without the wife's consent seems to be established by a late case in Iowa. The proposition, as heretofore generally understood and conceded, has been that the homestead should not only be protected from forced sale upon legal process, but that neither spouse could legally convey or encumber it, but it would seem that an easement is not to be regarded as affecting the title to the land, and that, therefore, the husband might grant a way over the homestead, so long as thereby he does not defeat the occupancy of it as such, upon the same principle that a husband, having the control of the income from the homestead, might lease such parts as were not in actual use by the family, or might farm out a part of it on shares. That he could alone grant an estate in it, even of the nature of an easement, which should be a permanent one and uncontrollable by the spouses, appears to be antagonistic to the general intentions of the framers of the constitution and laws as to homesteads, but the latest ruling upon the point favors the right of the husband so to do." The author cites the case from 38 Iowa, *supra*.

In the case of *Trickey v. Schlader*, 52 Ill. 78, the facts are not given. We notice the following statement in the opinion: "As this road was only an easement, and did not dispose of the fee, the question of a homestead right in the land by the surviving widow cannot arise."

We have no criticism to make of these decisions, or the law as declared by the text-writers we have quoted. The decisions may accord with the law and its policy of those states. They do not accord with ours. Section 2507 of the code of 1886 reads as

follows: "The homestead of every resident of this state, with the improvements ⁶¹⁹ and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be, to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts contracted after twenty-third day of April, 1873, during his life and occupancy, and if he leave surviving him a widow and minor child or children, or either, during the life of the widow and minority of the child or children; but the area of the homestead shall not be enlarged by reason of any encumbrance thereon, or of the character of the estate or interest owned therein by him."

Section 2508 is as follows: "No mortgage, deed, or other conveyance of the homestead by a married man shall be valid without the voluntary signature and assent of the wife, which must be shown by her examination, separate and apart from him, before an officer authorized by law to take acknowledgment of deeds, and the certificate of such officer upon, or attached to such mortgage, deed, or other conveyance, which certificate must be substantially in the following form," etc.

These statutes are fully in harmony with the constitution of the state: Const., art. 10, par. 2. By many decisions of this court, it has been held that any conveyance of the homestead by the husband alone, or defectively executed by the wife, is a nullity: *McGuire v. Van Pelt*, 55 Ala. 345; *Miller v. Marx*, 55 Ala. 322; *Balkum v. Wood*, 58 Ala. 642; *Garner v. Bond*, 61 Ala. 84; *Slaughter v. McBride*, 69 Ala. 510; *Scott v. Simons*, 70 Ala. 352; *Snedecor v. Freeman*, 71 Ala. 140; *DeGraffenried v. Clark*, 75 Ala. 425; *Crim v. Nelms*, 78 Ala. 604.

It has also been held that such invalid conveyances do not operate as an estoppel against the husband: *Halso v. Seawright*, 65 Ala. 431; *Alford v. Lehman*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604.

In *Jenkins v. Harrison*, 66 Ala. 345, it was held: "The constitutional provision which declares that a 'mortgage, or other alienation of the homestead,' by a married man, 'shall not be valid, without the voluntary signature and assent of the wife' (Const., art. 10, sec. 2), applies only to instruments which are perfected by delivery, and operative as conveyances; and though an ⁶²⁰ instrument which is duly signed, sealed, and acknowledged as a deed, but defective and inoperative as a deed for want of delivery, may be enforced in equity, as against the husband or

his heirs, as a contract to convey, it cannot be so enforced as to the homestead."

The construction placed upon the constitutional provision and statutes of this state by these decisions, and the reasons therefor, are not in accord with the reasoning and conclusions of the courts in the cases cited as sustaining the proposition that the husband can make a valid conveyance of right of way over the homestead without the voluntary assent of the wife, or that such a conveyance operates as an estoppel upon him, or that an agreement by him to convey may be specifically enforced.

In the well-considered case of *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770, the court after reviewing the cases cited from Iowa and Texas, for reasons consistent with the decisions of this court, and which are entirely satisfactory to us, lay down the rule that "the husband cannot, without the consent of his wife, grant or alienate the right of way for a railroad across land owned by him and occupied as a homestead by his family."

In *Waples on Homestead and Exemption*, page 945, it is said: "Right of way is an easement of perpetual use, and is, therefore, almost equivalent to fee simple title; it prevents the owner from the exercise of dominion. Could such an easement be granted without molesting the enjoyment of the homestead, there would seem to be no good reason why a married owner could not give it without the assent of the other marital partner, since, in such case, the encumbrance would not be such as to defeat the purpose of the law in protecting families in their homes. It can hardly be conceived, however, that a railroad can cross a farm, or the grounds of a town residence, without disturbing the dominion and enjoyment of the property. It is held, therefore, that the granting of right of way, by a married man, through his homestead requires the consent of his wife. Where there is no constitutional or statutory requirement that her consent must be established by written evidence, other testimony will suffice.

"Where the law allows the husband to lease the homestead ⁶²¹ without the consent of his wife, the reason for his inability to grant the right of way across it by his individual act may not apply; but there is difference between leasing for a time and granting right of way without limit as to duration."

The fact that the homestead exemption embraces one hundred and sixty acres in area when not in a city or town is conclusive that the object was to provide something more than a mere house in which the family might reside. It is manifest that it contem-

plated a source from which a living might be derived for the family.

Conceding, then, that the instrument conveyed only a right of way, our conclusion is, that if it conveyed a right of way over the homestead, not having been legally executed by the wife, the conveyance is null and void. We must not be understood as holding that the conveyance was limited to the right of way, and that it did not convey title to the strip of land. We have conceded the question for the argument only. The evidence not only authorized but justified the trial court in the conclusion that the right of way granted was within the homestead of the grantor.

Affirmed.

HOMESTEAD—CONVEYANCE BY HUSBAND ALONE—RIGHT OF WAY.—A conveyance of a homestead, in which the wife does not join, is absolutely void under a statute declaring that no conveyance affecting the homestead of a married man shall be of any validity, unless the wife joins in the execution thereof: Note to Van Sandt v. Alvis, 50 Am. St. Rep. 28; McKenzie v. Shows, 70 Miss. 388; 85 Am. St. Rep. 654; monographic note to Poole v. Gerrard, 65 Am. Dec. 484, on conveyance of homestead. It has been held that the husband alone may convey a part of a community homestead to a railway company for a right of way, provided such conveyance does not operate to interfere with the enjoyment of the homestead by the wife: Chicago etc. Ry. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39; but, on the other hand, the consent of the wife is held necessary to validate a grant made by a husband to a railroad of a right of way over the homestead occupied as such by the family: Pilcher v. Atchison etc. R. R. Co., 38 Kan. 516; 5 Am. St. Rep. 770.

ELLIS v. PRATT CITY.

[111 ALABAMA, 629.]

GARNISHMENT—EXEMPTION OF INSURANCE MONEY. If city property, used for municipal purposes, is exempt, under the statute, from levy and sale under judicial process, insurance money, after a loss, takes the place of the property and is also exempt. Hence, a city hall, so used, is municipal property, and insurance money thereon, after a fire, is exempt from garnishment, although the building has been re-erected in better condition than before destruction, without using any part of the insurance money, which has not been collected, as these facts do not show that the city has waived or lost its claim of exemption.

GARNISHMENT—EXEMPTIONS—BURDEN OF PROOF. The statutory rules governing the contest of exemptions where the rights of creditors, or third persons claiming the property, are involved, are not applicable to the trial of an exemption claimed directly by the judgment debtor, as where a city claims exemption as to certain property used for municipal purposes; and the burden of proof is upon the plaintiff, in such a contest, to show that insurance money, the proceeds of the property, after its destruction by fire, is subject to garnishment in the hands of the insurance company.

Garnishment suit. On May 17, 1894, the appellant, Susan Ellis, recovered of the appellee, Pratt City, a judgment for one thousand dollars damages and ninety-four dollars and sixty cents costs, in an action of tort. On May 21, 1895, a garnishment was sued out, and on the next day it was served on the Southern Insurance Company, one of the garnishees. On June 20, 1895, the company answered, admitting an indebtedness of one thousand dollars due to Pratt City, payable in sixty days after June 18, 1895, and setting forth that it was due under a policy of insurance on the public hall and market house, and that the defendant claimed said money to be exempt, under the law, from garnishment because it was insurance money on public buildings. The answer asked the court to direct the payment of the money. The defendant filed its claim of exemption, which the plaintiff contested, but it was clearly shown that the buildings, which had been burned, were used for municipal purposes. The plaintiff's motion for a judgment against the garnishee was overruled, and judgment was rendered discharging the garnishee, from which the plaintiff appealed.

Brown & Harsh, for the appellant.

Houghton & Collier and J. B. Aird, for the appellee.

⁶³⁰ HARALSON, J. 1. Section 2514 of the code provides, that "all property, real or personal, belonging to the several counties or municipal corporations of this ⁶³¹ state, and used for county or municipal purposes, shall be exempt from levy and sale under any process, judgment, or decree whatsoever."

In *Mayor etc. v. Rumsey*, 63 Ala. 352, touching the power of municipal corporations to purchase and hold property for municipal purposes, this court said: "We do not hesitate to declare that city property owned or used by the corporation for public purposes, such as public buildings, public markets, hospitals, cemeteries, engine-houses, fire engines and their apparatus, and other property, real or personal, of kindred utility, cannot be taken in execution for debts of the city. But if the city owns private property, not useful or used for corporate purposes, such property may be seized and sold under final process, precisely as similar property of individuals is seized and sold: 2 Dillon on Municipal Corporations, sec. 446." And in a still more recent case, *Murphree v. Mobile*, 104 Ala. 532, it was held that where land owned by a city has been used for municipal purposes for a great number of years, the fact that for a short time during

such continuous use the city did not have occasion to use all of said property, or that there was a temporary use of it for private purposes at a small rental, does not change the character of the use to which the property was applied, and the land does not thereby lose its exemption from levy and sale under execution as provided by section 2514 of the code": *Klein v. New Orleans*, 99 U. S. 149.

It cannot be doubted, under our holdings, that the city hall in Pratt City, under the facts disclosed, was municipal property, held and used by the city for municipal purposes, exempt from levy and sale under any judicial process, judgment, or decree.

2. It is well settled by the current of authority that where a debtor's property, being his family homestead, burns down, being insured against loss by fire, the insurance money takes the place in the exemption statute of the property destroyed, and, like it, is also exempt and not liable to garnishment: *Thompson on Homesteads and Exemptions*, sec. 750. The reason of the rule is found in the fact that the property has been exempted by law for the use of the exemptor and his family, and he may insure it to protect himself and them from loss. It is intended by the insurance to secure the ~~632~~ means, in case of loss, for the restoration of the property after its destruction by fire. Not to allow the insurance money after loss to take the place of the property destroyed, and be exempt from liability to the debts of the exemptor, would, by a mere technical evasion, pervert the object and spirit of the statutes of exemptions, always to be liberally construed in favor of the exemptor. The same rule applies to exempted personal property: *Houghton v. Lee*, 50 Cal. 101; *Hall v. Fulgham*, 86 Tenn. 451; *White v. Fulgham*, 87 Tenn. 281; *Crawford v. Carroll*, 93 Tenn. 661; 42 Am. St. Rep. 943; *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311; *Kaiser v. Seaton*, 62 Iowa, 463; *Stebbins v. Peeler*, 29 Vt. 289; *Mitchell v. Millhoan*, 11 Kan. 617; *Cooney v. Cooney*, 65 Barb. 524; *Smyth on Homesteads and Exemptions*, sec. 102; *Waples on Homesteads and Exemptions*, 609.

A different rule has been announced in *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128, and in *Smith v. Ratcliff*, 66 Miss. 683, 14 Am. St. Rep. 606; but these cases are not sanctioned by the weight of authorities.

No reason can be assigned why a municipal corporation may not insure property owned by it for municipal purposes against destruction by fire, and that the proceeds of the policy, in case of loss, shall not stand in the place of the property destroyed,

to be used by it for the restoration of the property. On principle and authority, the corporation, in such a case, will stand upon the same footing as to the insurance fund as an individual exemptor under the statute, who insures his exempted property: *Fleishel v. Hightower*, 62 Ga. 324.

3. There was no dispute as to the fact that the hall of the city was insured for one thousand dollars, and the insurance company acknowledged its obligations to pay. When garnished, it filed its answer admitting the indebtedness, payable on and after the 18th of June, 1895, and set up that defendant claimed the money as exempt from garnishment, because it was insurance money on the hall and market house of the city—a public building. It asked the court to direct how the money should be paid.

The defendant, as claimant, propounded its claim duly verified in the court. The claim as made was, that the building which had been insured and destroyed by fire belonged to the city and had been occupied and used by it for municipal purposes, and was necessary for its use ⁶³³ in the administration of its government. The proofs fully sustained this claim of the city. It was also shown that in May, 1895, before this garnishment proceeding, the mayor and aldermen of the city met and adopted a resolution to rebuild said hall and market on its former site, and setting aside the funds arising from the insurance of the one destroyed, for the purpose of erecting the new one. It was also undisputed, as stated in the abstract, that at the time of the trial, "this building had been erected by the defendant, Pratt City, in better condition than it was before the fire, and without the use of any part of the insurance money, same never having been collected, but that the city still owed something for said re-erection," but how much was not shown.

The plaintiff, and this proof, moved the court for a judgment against the garnishee for lack of a sufficient claim of exemption by claimant. The only ground for the support of this motion seems to grow out of the admitted fact, that at the time of the trial, the building that had been destroyed had been replaced by the city in a better condition than before its destruction, without the use of any part of the said insurance money.

Neither the rules for the contest of the right of exemptions between the parties claiming them and a creditor contesting such claim, nor for the contest of a fund in the hands of a garnishee, between the plaintiff seeking to subject the fund as liable to his debt, and a claimant, disclosed by the garnishee, brought in on notice to him—as prescribed by statute in each instance—

were designed for or are applicable for the trial of an exemption of the character of the one before us. The statute, section 2514 of the code, as we have seen, exempts absolutely from levy and sale under legal process all real and personal property used for municipal purposes.

The plaintiff has failed to show, as the burden was on her to do, any right of condemnation of said fund in the hands of the garnishee. Under the evidence in the case, and the legal principles applicable thereto, said fund was not liable to, but was exempt from, plaintiff's garnishment. The fact that the building had been re-erected by the defendant in the manner stated, without the use of any part of the insurance money, which had not been collected, did not show that defendant had waived or lost its claim of exemption thereto, nor give ⁶³⁴ plaintiff any right to judgment against the garnishee. There was no error in the judgment of the lower court discharging the garnishee and overruling the motion of plaintiff for a judgment of condemnation of said fund: *Porter etc. Co. v. Perdue*, 105 Ala. 293; 53 Am. St. Rep. 124.

Affirmed.

EXEMPTION OF PROCEEDS OF EXEMPT PROPERTY.—INSURANCE MONEY derived from a policy of insurance on homestead improvements is not subject to garnishment at the suit of a creditor: *Chase v. Swayne*, 88 Tex. 218; 53 Am. St. Rep. 742, and note. The proceeds of insurance on exempt personal property, destroyed by fire, is also exempt from execution or garnishment: *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311; *Puget Sound etc. Co. v. Jeffs*, 11 Wash. 466; 48 Am. St. Rep. 885. On the other hand are cases holding that an unadjusted loss on a policy of insurance may be attached: Note to *Palmer v. Merrill*, 52 Am. Dec. 786; that an insurance company is liable as garnishee or trustee of the insured after a loss, though the property insured was exempt from attachment: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128; and that insurance money due after the loss of a house on a homestead is not exempt from levy under execution or attachment: *Smith v. Ratcliff*, 66 Miss. 683; 14 Am. St. Rep. 606; note to *Morgan v. Rountree*, 45 Am. St. Rep. 238.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HERRIMAN v. MENZIES.

[115 CALIFORNIA, 16.]

A MONOPOLY EXISTS WHEN all or so nearly all of an article of trade or commerce in a community or district is brought within the hands of one man, or set of men, as to practically bring the production of the commodity or thing within such single control, to the exclusion of all competition or free traffic therein. Anything less than this is not a monopoly.

TRADE, RESTRAINT OF, WHEN NOT UNLAWFUL.—If an association of firms engaged in the business of stevedoring in a city enter into a contract which provides that its object is to govern and control the business of master stevedores to be carried on by its members, and to divide the profits and losses of the business so carried on, that the association is to continue for five years, and is given power, through a majority of votes of its members, to fix a schedule of prices to be charged by its members, and that none of them will do work for any less price than that so fixed, except as may be allowed by the association, and that any member violating the contract shall pay the association a specified sum as liquidated damages, such contract will not be held to be unlawful as in restraint of trade, if it does not appear that the purpose thereof was any control of the business of the city wherein it was made to such an extent as to enable the members to exclude competition therein or to control the prices of such business.

TRADE RESTRAINT — MONOPOLIES — COMBINATIONS BETWEEN INDIVIDUALS or firms for the regulation of prices and of competition in business are not monopolies, and are not unlawful as in restraint of trade so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce.

Henry M. Clement, for the appellants.

T. C. Coogan, for the respondents.

19 VAN FLEET, J. In this case, the defendants appealed to this court from the judgment and from an order denying a mo-

tion for a new trial. The appeal from the judgment was heretofore dismissed, and the order denying a new trial affirmed in Department: *Herriman v. Menzies*, 115 Cal. 25. Subsequently, the order dismissing the appeal from the judgment was, upon petition therefor, set aside, and a hearing of the motion ordered in Bank. Since the last order, the appeal from the judgment has been submitted upon the merits, but without a waiver of said motion to dismiss.

The appeal from the judgment involves but one question—whether the complaint states a cause of action. The objection urged is, that the contract which forms the basis of the action, and under which the accounting is asked, is contrary to public policy and void. The contract is set out in *haec verba*. It provides for the formation of an association between several firms and individuals engaged in the business of stevedoring in the city of San Francisco, under the name of the Master Stevedores' Association, "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association is to continue five years. Certain officers, consisting of president, vice president, and secretary, whose duties are defined, and a standing committee for the auditing of accounts of the members, are provided for. The association is given ²⁰ power through a majority vote of its members to "fix a schedule of prices or charges for any and all work, as stevedores, to be done and performed by its members, and they hereby agree that they will each of them observe and abide by such schedule of prices or charges, and that none of them will do or perform any such work at or for less or lower prices, or suffer or allow any discount to be made therefrom, except as may be allowed or authorized by the association.

"9. Each of the firms and parties hereto is to carry on the business of master stevedores, according to the provisions of this agreement, in their own names as heretofore, for the benefit of this association; and each agree to do so in an efficient and economical manner, and that their disbursements shall be subject to examination and approval or disapproval as herein provided."

Each member is required to keep full and correct accounts of the business done by him, including all receipts and disbursements, and render statements thereof at stated intervals to the association. The agreement covers all business done by any of the members in San Francisco and the other ports in the state, and provides that any member violating any provision of the contract shall pay to the association a certain amount as liquidated damages.

It is contended that the contract contemplates an illegal scheme and combination to stifle competition in the stevedoring business, and is in restraint of trade, and that its effect is to create a monopoly; and that in these respects it contravenes public policy, and is opposed to good morals, and so constitutes no proper basis for an action either at law or in equity.

The objection that its effect is to create a monopoly in, and unduly restrict, the business of stevedoring does not find support in its terms. A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing ²¹ within such single control to the exclusion of competition or free traffic therein. Anything less than this is not a monopoly. Webster defines it as "the sole power of dealing in any species of goods"; and Bouvier as "the abuse of free commerce, by which one or more individuals have procured the advantage of selling all of a particular kind of merchandise." And these definitions accord with that given by later writers: *Spelling on Trusts and Monopolies*, sec. 133.

An agreement, the purpose or effect of which is to create a monopoly, is unlawful, if it relate to some staple commodity, or thing of general requirement and use, or of necessity, and not something of mere luxury or convenience. Assuming that the business of stevedoring is a thing which is the proper subject of a monopoly within this definition, there is nothing in this agreement to render it obnoxious to that objection, nor anything to show that it will operate to unlawfully restrain trade. It nowhere appears therefrom that the parties to this contract, by the combination of their business interests provided for, are in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or control the price of such labor or business. There is absolutely nothing to show that they comprise more than the most insignificant part or fraction, either in number or volume of business, of those engaged in that trade in this community. We are not at liberty to indulge in inferences which would restrict the parties in their right to combine their interests. Parties are to be given the widest latitude to make contracts with reference to their private interests: *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 465; and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. Appellant says that the purpose of this contract is expressly declared as that of

“controlling the business of stevedoring,” and that this implies an improper restriction of that business and a monopoly. But the language of the contract is, “to govern and control the business of master ²² stevedores, to be carried on by its members.” This is a very different thing from a combination to control the entire business of stevedoring. Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. Say the supreme court of Illinois, in *People’s Gas Light etc. Co. v. Chicago Gas Light etc. Co.*, 20 Ill. App. 492: “The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern cases. Maule, J., in *Proctor v. Sargent*, 2 Scott N. R. 289, remarked that: ‘Many persons who are well informed upon the subject entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragement were held out to individuals to embark large capitals in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient’: Greenwood on Public Policy, 689, and cases cited.”

And in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, it is said: “The old doctrine of the common law that contracts in restraint of trade are void is no longer to be rigorously insisted upon, precisely as it was insisted upon in the earlier cases in which it was announced. It has been modified by the more recent decisions, as the laws of trade have become better understood during the development of our commercial system, and the changes which have been introduced in the social system: *Presbury v. Fisher*, 18 Mo. 50; *Long v. Towl*, 42 Mo. 545; 97 Am. Dec. 355. It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade.”

²³ We find nothing in the terms of the present agreement which would necessarily work an unreasonable restriction in the manner of conducting the business in question, or which would necessarily interfere with the freedom or right of others not parties to the contract to engage in and carry on such business. The parties themselves, it is true, have combined their business as

severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this, in itself, is not an unlawful restraint of trade, so long as it does not appear that the rates to be charged are unreasonable, or the restriction such as to preclude a fair competition with others engaged in the business.

In *Collins v. Locke*, L. R. 4 App. Cas. 674, it is held that where the object of an agreement was to parcel out the stevedoring business of the port of Melbourne among the parties to it, and so prevent competition, at least among themselves, and reasonably keep up the price, it was not invalid, though its effect might be to create a partial restraint upon the power of the parties to exercise their trade.

In *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1, where an agreement not materially unlike the present was entered into between master stevedores, fixing a rate of prices to be charged by the members in their business, and making a penalty for any member doing work for less, and an action was brought to enforce such penalty for a default by one of the members, it was held that such an association was not an unlawful combination as injurious to trade or commerce, nor the restrictions unlawful, as being in restraint of trade.

"An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product": *Ray's Contractual Limitations*, 223, and cases there cited. See, also, *People's Gas Light Co. v. Chicago Gas Light Co.*, 20 Ill. App. 492; *Skrainka* ²⁴ *v. Scharringhausen*, 8 Mo. App. 522; *Ontario etc. Co. v. Merchants' etc. Co.*, 18 Grant U. C. 542; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353. In *Ontario v. Merchants' etc. Co.*, 18 Grant U. C. 542, speaking of an agreement of similar import between salt manufacturers to keep up the price of that commodity, it is said: "I know of no rule of law ever having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price—and nothing more than this has been agreed to by the parties here." We find nothing necessarily inconsistent with the doctrine of these cases in the cases cited by appellants.

In the case of *Pacific Factor Co. v. Adler*, 90 Cal. 117, 25 Am. St. Rep. 102, the language relied upon has express reference to contracts "entered into with the object and view of controlling

and necessarily suppressing the supply, and thereby enhancing the price of articles of actual necessity."

In *Mill etc. Co. v. Hayes*, 76 Cal. 387, 393, 9 Am. St. Rep. 211, in the language of the court: "The very essence and mainspring of the agreement—the illegal object—'was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured.'"

In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, the contract precluded the parties, absolutely, from shipping to or selling the commodity within a large part of the territory of the United States, and restricted the output of the powder within the territory wherein the parties were at liberty to sell; and it was held that the contract was void, as in restraint of trade. The cases from other states relied upon are as clearly distinguishable from the present as are the foregoing.

After a careful review of all the authorities, we are unable to say, from the terms of the present contract, that it, to any extent, trenches upon the rule of public policy²⁵ invoked, or that there is anything within its provisions which should preclude the parties thereto from enforcing it.

This conclusion renders the motion to dismiss the appeal of no consequence.

The judgment is affirmed.

Garoutte, J., Harrison, J., McFarland, J., Temple J., and Henshaw, J., concurred.

TRADE—COMBINATIONS IN RESTRAINT OF.—Combinations for mutual advantage, which do not amount to a monopoly, but leave the field of trade open to others, are not void as in restraint of trade, although they may have the effect of diminishing the number of competitors in business: *Oakdale Mfg. Co. v. Garst*, 18 R. L. 484; 49 Am. St. Rep. 784, and note. A combination to monopolize a business and the transfer to it of the property of its members does not purge it of its illegality: *Distilling etc. Co. v. People*, 156 Ill. 448; 47 Am. St. Rep. 200, and note.

FOLEY v. CALIFORNIA HORSESHOE COMPANY.

[115 CALIFORNIA, 184.]

MINOR EMPLOYÉES, WHEN ASSUME KNOWN RISKS.—Where the ordinary and usual occupation of a minor is the running of a machine or is some employment in and about it, and he is shown to have knowledge of its working, its dangers, and defects, and he is not of such tender years as to be unable to apprehend the nature of the dangers and defects, he takes upon himself, as will an adult under like circumstances, the perils of his employment, and, if injured in the course thereof, cannot recover of his employer.

MINOR EMPLOYÉES PUT TO WORK AT TASKS WITH WHICH THEY ARE NOT FAMILIAR.—If a minor is put to a task which, while within the range of his employment, is as to him, because of his youth and inexperience, unusual and strange, and though he knows that the machine with which he is at work is liable to start and injure him, yet he will not, as a matter of law, be adjudged guilty of contributory negligence if injured by the sudden starting of a machine while he is at work in a strange and unusual place, and at the command of his foreman.

NEGLIGENCE, CONTRIBUTORY OF CHILDREN.—The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult is called upon to use in the same circumstances.

MINOR EMPLOYEES—NEGLIGENCE, OBEYING FOREMAN. A minor cannot be expected to set up an opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, and it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master.

MASTER AND SERVANT—FELLOW-SERVANTS.—Between an assistant foreman and a boy subject to his orders the relation of fellow-servants does not exist so as to relieve the employer from liability for injuries received by the boy from obeying the orders of such foreman.

MASTER AND SERVANT—MINOR EMPLOYÉES, DUTY TO INSTRUCT.—Owners of dangerous machinery, employing an inexperienced minor about it, unacquainted with its nature or use, are bound to take care that he is instructed therein. If they neglect this, or give directions to use the machinery in a manner which must lead to danger of which he is not likely to be fully aware, they are liable for any injury done to him in the use of machinery in that manner.

JURY TRIAL.—INSTRUCTIONS to a jury, on the trial of an action by a minor employé to recover for injuries alleged to have been received from the sudden starting of a machine, and which speak of dangerous machinery, are not erroneous as assuming the fact that the machine which inflicted the injury was dangerous, if it was of a class which, according to common knowledge, must be dangerous while in motion.

GUARDIAN AD LITEM—APPOINTMENT DURING A TRIAL.—If it appears on the trial of an action brought by a minor by his guardian ad litem that the appointment of such guardian was irregular and void, the court may then and there permit another petition to be filed, and make another order appointing such guardian, and the trial may then proceed.

APPELLATE JURISDICTION—COST.—If the jurisdiction of an appellate court is limited to actions in which the amount in controversy exceeds three hundred dollars, the action of a trial court in awarding plaintiff costs for less than that sum cannot be reviewed upon appeal.

T. Z. Blakeman, for the appellant.

Sullivan & Sullivan, for the respondent.

¹⁸⁸ **HENSHAW, J.** This is an action for damages for personal injuries by a minor against his employer. Plaintiff recovered a judgment under the verdict of the jury, and defendant appeals from the judgment and from the order denying his motion for a new trial. He also appeals from the order taxing costs, and denying his motion to vacate the judgment.

Plaintiff, at the time of the accident, was fourteen years and four months old. He had been working in the shop of the defendant for fourteen months; and for four months immediately preceding the accident he had been engaged in punching horseshoes with a punching machine. The complaint avers that plaintiff was employed by defendant to punch holes in horseshoes by means of a machine known as a horseshoe punching machine; that at all times during his employment he ¹⁸⁹ was in the performance of his duties in the factory under the control of and subject to the orders and directions of defendant's assistant foreman; that on the 17th of June he was ordered by said assistant foreman to adjust a portion of the mechanism operating the punching machine; that to adjust this was a hazardous undertaking; that the hazard was well known to defendant and to the assistant foreman, but that plaintiff was unfamiliar with the mechanism and the manner of adjusting the same, and was ignorant of the hazard. Plaintiff, in obedience to the order from the assistant foreman, was engaged in this labor when the machine, by reason of its defectiveness and the defective and unsecured condition of the belts and pulleys used in operating it, was suddenly set in motion, whereby plaintiff's right arm was caught by cogwheels, crushed, and mangled.

Defendant contended that the accident resulted from the plaintiff's own negligence, and from the negligence of plaintiff's fellow employé, the assistant foreman.

The punching machine was moved by a belt. When it was desired to stop the machine the belt was thrown from the tight pulley to a loose pulley. The belt was so defectively constructed that one end of it at the place of juncture projected. By constant striking upon this projecting end the belt would work

back from the loose pulley on to the tight pulley, and so set the machine in motion. This defect was known to the plaintiff, and had by him been reported to Rodifer, the assistant foreman, who told the boy, "That would be all right; that would not hurt nothing." The shifter used in moving the belt from the fixed to the loose pulley was likewise defective, and its condition tended also to cause the belt to move back upon the fixed pulley without the intervention of an operative.

Upon the day in question the boy's machine was at rest. A tap bolt which had fallen out from the box holding the shaft wheels at the rear of the machine was taken by Foley to Rodifer. Rodifer directed the boy to ¹⁹⁰ screw the bolt into its proper place. He did not know how to do the work, and Rodifer gave him directions. While obeying these directions, and standing behind the machine inside the wheel screwing on this tap bolt, the sleeve of his right arm became entangled with a small cogwheel, and, as the machine started while he was thus at work, his arm was drawn in and crushed.

It is, perhaps, proper to say that this statement presents the testimony in a light most favorable to plaintiff. Nevertheless, it is a statement borne out by the testimony, and from their verdict it is the view which the jury must have accepted.

From this statement appellant urges that it appears that plaintiff, by his own testimony, knew the special danger and risk which, because of the defective appliance, must have attended the working of the machine, and that, having this knowledge, and his injury having resulted from this known defect, he stood as an adult with respect to his master's liability for any injury arising from it, and cannot recover; that he undertook to screw the nut upon the machine while it was in the condition which he himself considered and testified to as dangerous.

Where the ordinary and usual occupation of a minor is the running or management of a machine, or is some employment in and about it, and the minor is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, it is beyond question the rule, sanctioned by a long line of authority, that he takes upon himself, as will an adult under the same circumstances, the perils and risks of his employment; and, that, if injured in the course thereof, he may not look to his employer for compensation.

But there is a distinction which, as a matter of humanity as

well as law, should be drawn between such cases and those where the minor is put to a task which, ¹⁹¹ while within the range of his employment, is to him in his inexperience and youth unusual and strange; and it is a case of the latter kind which we are here called upon to consider. Had the accident to the boy occurred while he was engaged in the ordinary operation of his machine, it could be said without hesitation that knowing the peculiar danger to which he might be exposed by its sudden starting, and knowing as he did that it was liable thus suddenly to start, he continued in his employment, taking upon himself the responsibility for any accident which might result therefrom.

But the accident did not occur while he was engaged in his ordinary occupation at the machine. It occurred while he was engaged in the unusual task set him, that of screwing on a fallen bolt. It is true that while engaged in this task he had still the knowledge that the machine was liable to start, but does this fact establish that for which appellant contends, viz., that he had assumed that particular risk while screwing on the nut, as he had assumed it generally in operating the machine?

We think that as a proposition of law this cannot be said. Were the employé in this case an adult, the rule might well be different; but the very reason why an adult under these circumstances would be held to have taken the risk while screwing on the nut serves to show the injustice and hardship which would result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment upon those facts as would the employer. The employer's duty is fulfilled, and he is not negligent, if he puts the employé in full possession of the facts, and makes him acquainted with the attendant dangers and risks. Therefore, if an adult employé engaged in operating the punching machine, and knowing that it was liable ¹⁹² suddenly and unexpectedly to move, were told to screw on the misplaced nut, it might very properly be said that in the performance of this task his judgment of any increased risk or danger attending it would be as good as his employer's, and that if he chose under those circumstances to undertake the work, the responsibility for any accident that might befall him therefrom would be upon him alone. The conduct of the child, however, is and should be viewed and measured by a

different rule. Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but, in addition to this, and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or to reason upon his facts comes to him later in life. A child might be capable of understanding the construction, the use, and the danger of fire-arms; yet one would not for that reason feel justified, after due explanation, in giving them to him as playthings. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment.

When sent out to labor they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent, they must do as they are told.

It would be barbarous to hold them to the same accountability as is held the adult employé who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which ¹⁹³ measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position.

So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism to perform a novel duty, we cannot say, as matter of law, that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court.

In this case, it is true, the boy knew when he was engaged in

screwing on the nut that the machine might start, but it does not appear that he knew or had judgment to appreciate any added risk which the particular task rendered him liable to. The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must employ, is very different from the amount which the law in its humanity exacts from a minor.

It is well said by the supreme court of appeals of West Virginia in *Turner v. Norfolk etc. Ry. Co.*, 40 W. Va. 675: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands, and pay deference to the judgment of his elders, ¹⁹⁴ until legally emancipated at the age of twenty-one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master."

We cannot say, therefore, as matter of law, either that the child with knowledge assumed the risks incident to the task, or that in performing the task he exercised less than the ordinary care required of him.

It is next insisted that plaintiff was injured because of the negligence of the fellow-servant, Rodifer, and that for this reason plaintiff cannot recover. The case of *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38, 1 Am. St. Rep. 22, is here relied upon; but in the *Fisk* case the boy had been put to work in the toolroom, and under the directions of the boss of that room. In excess of his authority, the boss of that room sent him into another part and department of the shops, there to work, and it was there the boy was injured. It is said: "He was a boss in the toolroom, and as such we may fairly assume he was authorized to control and direct the manner in which the work of that room was to be performed, and all things relating to the order and proper conduct of his branch of the business. . . . The employment to work in the tool shop was the subject matter, and the control given to Snape and the directions to plaintiff to obey him must be construed with reference to and confined to such subject matter."

In the case at bar, the plaintiff pleads and shows that, in the

performance of his duties in defendant's factory, he was under the control of, and subject to the orders and directions of, defendant's assistant foreman, Rodifer. It was in pursuance of Rodifer's order, within the scope of his authority, that plaintiff was injured.

In the case of *Mullin v. California Horseshoe Co.*, 105 Cal. 77, the machinist Brunig had general supervision of the boys, and gave them orders and instructions. He put the plaintiff to work as a press boy, and directed him generally about his work until he was ¹⁸⁹⁵ injured. It was there held that Brunig was the representative of the employer, and not a mere fellow-servant with the one who was injured.

We will not say, under these circumstances, that, between Rodifer in control of the work, and the boy subject to his orders, the relation of fellow-servant existed so as to relieve the employer of liability.

Certain instructions given by the court at plaintiff's request are complained of. One will serve as an example for all. It is as follows: "The owners of dangerous machinery, who employ a minor and inexperienced person about it, unacquainted with its nature and use, are bound to take care that such person is duly instructed therein, and, if they either neglect this, or if express directions are given to use the machinery in a manner which must lead to danger, of which such person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care or circumspection, in a child of tender years as in an adult."

It is claimed that this instruction is erroneous, in assuming as a fact that the machinery was dangerous; but it is spoken of as a dangerous machine, not because of the claimed defect in the belt and shifter, but because, as a matter of common knowledge, any machine operated by a swiftly moving belt, and containing as parts of its mechanism pulleys and cogs, and used for punching holes in iron, is in and of itself a dangerous machine. The proposition of law is unassailable.

The complaint averred the appointment of a guardian ad litem, and this averment was traversed by the answer. Upon the trial, when plaintiff undertook to make proof of such appointment, the court held the proof to be insufficient, and the appointment void, but permitted plaintiff, over the objection of defendant, to file a new petition, and then and there made its or-

der appointing a guardian ad litem, and ordered the trial to proceed. ¹⁹⁶ This is not ground for reversal. The judgment for plaintiff, even without the appointment of a guardian ad litem, would not have been void (*Childs v. Lanterman*, 103 Cal. 387; 42 Am. St. Rep. 121), and the practice adopted has been approved in *In re Cahill*, 74 Cal. 52.

Plaintiff filed a cost bill in the sum of three hundred and fourteen dollars, and the clerk, without awaiting the determination of defendant's motion to tax costs, entered a judgment for the sum claimed. Defendant moved to vacate the judgment. The court disallowed twenty-two dollars of plaintiff's bill, and allowed costs in the sum of two hundred and ninety-two dollars, and likewise ordered the amount of costs specified in the judgment to be reduced to this amount.

The amount of costs allowed being less than three hundred dollars, the action of the trial court in the matter is not reviewable upon appeal: *Fairbanks v. Lampkin*, 99 Cal. 429. The clerk's error in entering the judgment for costs was cured by the order of the court reducing the amount, and the refusal to vacate the judgment could have worked no injury to appellant.

The judgment and order appealed from are affirmed, as is also the order of the court refusing to vacate the judgment. The separate appeal from the order taxing costs is dismissed.

McFarland, J., and Temple, J., concurred.

THE PRINCIPAL CASE was followed and applied in *Verdell v. Gray's Harbor Commercial Co.*, 115 Cal. 517, an action by the plaintiff, who, at the date of his injury, was eighteen years of age. He had been directed by the defendant's foreman to do unusual work upon dangerous machinery, and had received his injury while complying with such direction. The court said: "When it is claimed that the injured employé himself was guilty of such negligence as to bar him from recovering for his injuries, it must appear that he not only knew, or had means of knowledge, of the unsafeness of the place, appliances, or machinery, but also knew, or ought to have known, of the danger to which he was himself personally exposed."

MASTER AND SERVANT — MINORS — ASSUMPTION OF RISKS.—Minor or inexperienced servants, as well as ordinary servants, in their contract of employment, assume all risks ordinarily incident to the service, and this includes all of which they have notice, and all which are patent and obvious to them: *Taylor v. Wootan*, 1 Ind. App. 188; 50 Am. St. Rep. 200, and note; to the same effect, *Chicago etc. Brick Co. v. Reinneiger*, 140 Ill. 834; 33 Am. St. Rep. 249, and note.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉS.—When a minor employé is very young, with no knowledge by experience or instruction as to the risks of a particularly dangerous service in which he was not at first employed, but into which he was urged by the master against his will, and the appliance from which

the injury arose was only in partial use, while another simple device, which practically removed all danger, was in extensive use, the master is guilty of negligence, and the servant may recover: *Kehler v. Schwark*, 151 Pa. St. 505; 81 Am. St. Rep. 777, and note. A servant, whether minor or adult, without fault on his part suddenly placed in a position of danger by his employer, is not guilty of contributory negligence in failing to act quickly upon the best course to escape the threatened danger: *Neillson v. Hillside Coal etc. Co.*, 168 Pa. St. 256; 47 Am. St. Rep. 886, and note.

MASTER AND SERVANT—INFANT EMPLOYÉES.—A master may employ an infant in a hazardous occupation on condition that he shall furnish such infant with such information relative to the dangers of his situation as will enable him to comprehend such perils and understand how to avoid them: *Taylor v. Wootan*, 1 Ind. App. 188; 50 Am. St. Rep. 200, and note. Infant employés are entitled, at the hands of their employer, to instruction as to the dangers of their employment and how to avoid them, and therefore do not, in the absence of such instructions, assume all the usual dangers incident to the employment, nor take upon themselves the hazards of the use of defective tools and machinery: *Norton v. Volzke*, 158 Ill. 402; 49 Am. St. Rep. 167, and note. See, also, the extended note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 28.

NEGLIGENCE—CONTRIBUTORY—CHILDREN.—A child is presumed to possess only such discretion as is common to children, and is therefore held answerable only to the exercise of such care as is reasonably to be expected from children of his age and capacity: *Railroad Co. v. Mackey*, 58 Ohio St. 370; 58 Am. St. Rep. 641.

MORRISON v. ROGERS.

[115 CALIFORNIA, 252.]

A MARRIAGE BROKERAGE CONTRACT IS INVALID as being contrary to public policy, and services rendered under such a contract do not constitute any legal consideration, and afford no sufficient foundation to an action to recover a sum agreed to be paid therefor. An undertaking to procure a person to keep a promise of marriage already made is as much within the rule as a contract of marriage brokerage entered into in advance of such promise to marry.

W. W. Allen, Sr., W. W. Allen, Jr., and A. R. Cotton, for the appellant.

Van R. Paterson, for the respondent.

253 HARRISON, J. This action was brought to recover certain moneys, which it is alleged the defendant promised to pay to the plaintiff if she would use her influence in endeavoring to induce a certain person to marry the defendant, and should be instrumental in bringing about such marriage. It is alleged that, in consideration of said promise by the defendant, the plaintiff did endeavor to persuade said person to marry the defendant, and was instrumental in bringing said marriage about, and that the

defendant has failed to keep her promise, and has not paid the money agreed by her to be paid.

The rule that a marriage brokerage contract is invalid, as being contrary to public policy, and that the services rendered under such contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery, is so elementary that but very few cases involving the question have found their way into the reported decisions; but whenever the question has been presented, courts have invariably declared that the action could not be maintained: Story's Equity Jurisprudence, sec. 261; 2 Parsons on Contracts, *74; Greenhood on Public Policy, 478; Williamson v. Gihon, 2 Schoales & L. 357; Crawford ²⁵⁴ v. Russell, 62 Barb. 92; Duval v. Wellman, 124 N. Y. 159; Johnson v. Hunt, 81 Ky. 321.

It is sought to distinguish the present case from those in which the rule has been laid down by the fact that here there was an existing agreement for marriage between the parties, and that the agreement with the defendant was only for the purpose of promoting the carrying out of that agreement. We are of the opinion, however, that this fact does not take the case out of the above rule. The same reasons by which the rule is upheld control here. The freedom of choice essential to a happy marriage, and the voluntary selection by each spouse of the person who is to be his companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives, to induce one of the parties to an agreement for marriage to carry it into effect if he has once been disposed to abandon it, as by an endeavor to bring about such an agreement between parties who do not sustain any relation to each other. The basis of the agreement with the plaintiff in the present case is alleged to be the fact that the defendant became apprehensive that the person who had agreed to marry her would not keep his agreement, and it was for the purpose of inducing him to forego whatever purpose he had to abandon such contemplated marriage, that the plaintiff rendered the services for which the action is brought. There can be no difference in principle between services rendered under such an employment and those rendered for the purpose of inducing one to marry another whom he did not previously know.

The court properly sustained the demurrer to the complaint, and the judgment is affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

CONTRACTS—MARRIAGE BROKERAGE—VALIDITY.—A marriage brokerage contract is an agreement for the payment of money or other compensation for the procurement of a marriage. Although there may not be a fraud on either party, such contracts are held void, and a public mischief, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children, and to tempt an undue and pernicious influence for selfish gain in respect to the most sacred of human relations: *White v. Equitable Nuptial etc. Union*, 76 Ala. 251; 52 Am. Rep. 325.

MURRAY v. MURRAY.

[115 CALIFORNIA, 266.]

PRACTICE—FINDINGS.—Where a judgment is entered by default after the publication of a summons, there is no necessity for findings, and, if any are made, they constitute no part of the judgment-roll, and the facts of the controversy must in the appellate court be sought in the complaint and judgment only.

FRAUDULENT TRANSFERS BY HUSBAND, ATTACK UPON BY WIFE.—A wife entitled to maintain a suit against her husband for maintenance may, as an incident thereto, attack and have declared void as against her a transfer of his property made by him for the purpose of defeating her right to maintenance.

FRAUDULENT TRANSFER BY HUSBAND BEFORE MARRIAGE.—If a man, after an agreement to marry a woman and their assumption of the relations of husband and wife, voluntarily transfers his property to defeat her rights, and subsequently marries and deserts her, she, in a suit against him for maintenance, is entitled to have such transfer declared fraudulent and void as against her.

RECEIVER IN A SUIT BY WIFE FOR MAINTENANCE.—In a suit for maintenance, the court may appoint a receiver at the commencement of the suit, and authorize him to take possession of the property of the husband and apply it to the satisfaction of the maintenance decreed to the wife.

A RECEIVER MAY BE APPOINTED BEFORE AN ANSWER IS FILED, if the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss.

JURISDICTION—TAKING POSSESSION OF PROPERTY—CONSTRUCTIVE SERVICE OF PROCESS.—If, in an action by a wife for maintenance, a receiver is appointed, and property of the husband taken into his possession, after which the summons is served by publication, a judgment for such maintenance is valid as to the property in the possession of the court by its receiver.

FRAUDULENT TRANSFER—PARTIES NOT BEFORE THE COURT.—In a suit for maintenance, it is error to declare void transfers made by a husband to persons who are not parties to the suit.

JURISDICTION, CONSTRUCTIVE SERVICE OF PROCESS.—In a suit for maintenance, where the defendant is a nonresident, and process is served by publication, the court cannot require defendant to execute a bond in favor of the plaintiff for the payment of alimony. No personal obligation can be imposed upon a nonresident under such circumstances.

FRAUDULENT TRANSFERS, RELIEF AGAINST.—In a suit for maintenance, wherein the wife attacks transfers as made in fraud of her rights, the judgment should not interfere with such transfers further than is required for her protection, and, if a receiver is appointed, the court should declare precisely what property is to remain in his hands, and the balance should be excepted from the effect of the judgment.

MAINTENANCE—PHYSICIAN'S BILL.—In a suit against a husband for maintenance, the payment of a physician's bill for services to his wife may be directed to be made.

J. H. Daly and Sayle & Coldwell, for the appellants.

J. P. Meux and H. M. Johnston, for the respondent.

269 **BRITT, C.** Plaintiff having been deserted by her husband, the defendant Owen Murray, she instituted this action against him for maintenance, without divorce, and to set aside certain transfers of property made by him to his brother, the defendant James Murray, which obstruct the enforcement of her right. Both defendants being absent from the state—said James residing in Canada—summons was served on them by publication and mailing as prescribed by statute. They failed **270** to appear, and plaintiff obtained judgment, from which defendants appeal. In the printed transcript appears a paper entitled "Findings," and it is recited in the judgment that the court, after hearing the evidence, "made and filed its findings of fact and conclusions of law herein"; but as there was no necessity for findings, and as in such a case findings, if made, do not constitute part of the judgment-roll (Code Civ. Proc., sec. 670), we can look for the facts of the controversy only to the complaint and judgment; such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence.

It appears from the complaint that plaintiff and defendant Owen, residents of Fresno county, in this state, about August 1, 1893, agreed to intermarry, and at once assumed the relations of husband and wife, and she was got with child by him; on November 7th following they were lawfully married, and in March, 1894, he brought her to the city of San Francisco, where he abandoned her among strangers, and himself departed the state, leaving her in circumstances of miserable destitution. In October, 1893, after the said meretricious cohabitation had begun, said Owen was the owner of divers promissory notes secured by mortgages of real estate amounting in face value to near six thousand dollars, among which was a note and mortgage executed in his favor by one Briscoe for the sum of two thousand dollars, and

another executed by one Crow for the sum of fifteen hundred dollars; he also owned a sheriff's certificate of sale of certain land in the town of Fresno, and then had possession of such land. Without the knowledge of plaintiff, and with intent to defraud her of the right to subject said property to her claims for maintenance and support, about October 4, 1893, he assigned and transferred said notes and mortgages and said certificate of sale to his brother, said James Murray, who rendered no consideration for such assignment, but was "cognizant of said intent and purpose, and conspired with defendant ²⁷¹ Owen to get rid of his property in the manner aforesaid, in order to defraud the plaintiff out of the enjoyment and benefit of any portion thereof." At the same time said Owen received back from his brother a power of attorney authorizing him to manage said property for the latter; acting thereunder, on February 7, 1894, he collected the money due on the note and mortgage of Crow, and released the mortgage, but kept the money for himself. A deed was made subsequently to said assignments, conveying the land described in said certificate of sale to said James Murray, and about March, 1894, said Owen leased such land, which had been occupied as the home of himself and plaintiff, to one Smith, who went into possession of the same; the said notes and mortgages, other than that released on February 7, 1894, are within the jurisdiction of the court, and said Owen has no other property within the state to the knowledge of plaintiff. It was averred in the complaint that, unless a receiver be appointed to take charge of said securities and said land, the defendants would convey the land and remove the securities beyond the control of the court. The prayer was for maintenance and alimony, pendente lite and permanent; that the said transfers and conveyance be canceled and the said property adjudged to belong to defendant Owen; that a receiver be appointed to take charge of the same, etc.

By its judgment rendered November 22, 1894, the court in terms set aside the transfers and assignments described in the complaint (except that of the Crow mortgage), and declared the property which was the subject thereof to be the property of said Owen, and chargeable with the maintenance of plaintiff and their infant child; in like manner it declared to be fraudulent and void the said lease to Smith, and also a certain deed of real estate made by one Evans and one Mancourt to James Murray, on February 14, 1894, and declared the land described therein to be the property of said Owen; it was further adjudged that plaintiff be ²⁷² permitted to occupy and use the premises

in the town of Fresno formerly occupied by herself and her said husband, and that she be allowed, in addition, the sum of twenty-five dollars per month, from December 1, 1894, the payment of the same to be a charge upon said premises, and also secured by a bond in the sum of fifteen hundred dollars, which said Owen was required to execute with sureties; that in default of such bond the receiver previously appointed by the court (who by the admission of counsel and the recitals in the judgment appears, on the commencement of the action, to have taken possession of all the property involved) deposit the note and mortgage of said Briscoe in the hands of a person designated to receive the same "as security for the payment to plaintiff of said alimony"; that the receiver pay the sum of twenty-five dollars to certain physicians named for professional services rendered to plaintiff during illness; "that when said several sums of money have been paid, and the further payment of alimony . . . properly secured as provided herein, the receiver is directed to deliver all of said property and effects remaining after said payment into the custody" whence he had taken it; which being done, the receiver shall be finally discharged.

1. It may be, as contended by appellants, that in virtue of our statute (Civ. Code, sec. 157), declaring that neither husband nor wife has any interest in the property of the other, the wife, in this state, merely because of her conjugal relation, has no standing to attack a voluntary disposition of her husband's separate property, made either before or after marriage, and this for the apparently simple reason that the fact of marriage gives her no interest: *Smith v. Smith*, 12 Cal. 216; 73 Am. Dec. 533; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Dudley v. Dudley*, 76 Wis. 567; *Butler v. Butler*, 21 Kan. 525 et seq.; 30 Am. Rep. 441; but that is not the question here; admitting such to be the rule, the plaintiff is not affected by it; she is the deserted wife of defendant Owen, and by reason of his act of desertion is authorized ²⁷³ to maintain the action: Civ. Code, sec. 137; to defeat its purpose he made the transfers of property to his brother; every transfer of property made with intent to delay or defraud any creditor or other person of his demands, is by the statute of Elizabeth, re-enacted in the Civil Code, section 3439, declared void as against all creditors of the debtor, etc.; the wife, though not in strictness a creditor of the husband, is yet, as concerns her right to maintenance, so far within the protection of this statute that it avoids his transfers made with the design to defeat such right: *Green v. Adams*, 59 Vt. 609; 59 Am. Rep. 761;

Tyler v. Tyler, 126 Ill. 525, 537; 9 Am. St. Rep. 642, and cases cited; **Stuart v. Stuart**, 123 Mass. 370; **Stewart on Marriage and Divorce**, sec. 381; see **Lord v. Hough**, 43 Cal. 581. And, the circumstances of this case considered, in our judgment the fact that the marriage had not been solemnized at the time of the transfers to James Murray cannot prevent the application of the rule here; the plaintiff was in that condition that even knowledge of the fraudulent assignments would not have enabled her to exercise a fair option whether she would fulfill her engagement with Owen Murray; to her the alternative was marriage, or the continued state of concubinage, and the bastardy of her offspring. In **Taylor v. Pugh**, 1 Hare, 608, the woman, before marriage, and without the knowledge of her intended husband, who had seduced her, executed a settlement of her property for her own benefit; after the marriage the husband filed a bill to set aside the settlement as in fraud of his marital rights; the court denied the relief, the vice-chancellor—Sir James Wigram—saying: "The husband, by bringing the intended wife to his house and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court with any effect that his wife has committed a fraud upon him because she has taken the precaution to have her property secured for herself and her children." Conversely, in this instance, the husband has ²⁷⁴ no equity to say that the assignments which would have been undeniably a fraud against the plaintiff if made after marriage, shall be treated as innocent because made before that event, when, by his conduct, marriage had become to her inevitable.

8. By section 140 of the Civil Code, the court in an action such as this, or for divorce, may require the husband to give reasonable security for providing maintenance, and may enforce the same by appointing a receiver. This court has said recently that the only authority for the appointment of a receiver in a divorce suit is to be found in that section: **Petaluma etc. Bank v. Superior Court**, 111 Cal. 488; if this be true also of an action for maintenance without divorce, it would seem that the language of the section is yet sufficient to justify the appointment of the receiver made in this case at the commencement of the suit: **Carey v. Carey**, 2 Daly, 424. But assuming that the statute does not reach so far, still, in our opinion, the action is by reason of the inadequacy of purely legal remedies so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed under the general provision for such an officer

in all cases "where receivers have been heretofore appointed by the usages of courts of equity": Code Civ. Proc., sec. 564. That the relief sought is within the general powers of a court of equity to grant, and is not dependent upon statute, has been decided by this court, and the principle has found quite general acceptance: Galland v. Galland, 38 Cal. 265; Story's Equity Jurisprudence, 1423 a; Hanscom v. Hanscom (Colo. App.), 39 Pac. Rep. 885, and cases cited; Tolman v. Tolman, 1 Dist. Col. App. Cas. 299. "The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack, for fraud, any transfers of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony: Hinds v. Hinds, 80 Ala. 225. The wife having such a demand, and her position ²⁷⁵ being assimilated to that of a creditor of her husband (Feigley v. Feigley, 7 Md. 537; 61 Am. Dec. 375; Tyler v. Tyler, 126 Ill. 525; 9 Am. St. Rep. 642; Livermore v. Boutelle, 11 Gray, 217; 71 Am. Dec. 708; Green v. Adams, 59 Vt. 609; 59 Am. Rep. 761), it would appear that a receiver in aid of the enforcement of the demand should be appointed, when the occasion arises, for reasons like those on which a creditor, seeking to avoid fraudulent conveyances of a debtor, is permitted to employ the same instrumentality. The rule in equity is, that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss: Bloodgood v. Clark, 4 Paige, 574; High on Receivers, sec. 105, and cases cited. As shown, the plaintiff here has a demand enforceable in equity, and it may be charged specifically upon the property described in the complaint: Robinson v. Robinson, 79 Cal. 511; Civ. Code, secs. 137, 140, 141; Plumb v. Bateman, 2 Dist. Colo. App. Cas. 170, 171; Hanscom v. Hanscom (Colo. App.) 39 Pac. Rep. 885. It seems necessarily to follow that the court had power to appoint the receiver at the beginning of the action. Of course, such a power should be very cautiously exercised, but there is nothing in the present record to show that the court was indiscreet in that behalf.

3. We have dwelt somewhat upon the matter of the receivership because of the influence of that proceeding on the question of the jurisdiction of the court to render any judgment at all. Service of summons by publication, or other form of substituted service of process for notifying an absentee or nonresident defendant of an action against him, is allowed to be effectual

"where, in connection with the process against the person for commencing the action, property within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein": *Pennoyer v. Neff*, 95 U. S. 733; *Brown v. Campbell*, 100 Cal. 276 641; 38 Am. St. Rep. 314. Perhaps the jurisdiction in this case is maintainable on the ground that the judgment is sought as a means of affecting an interest in the property described in the complaint; however that may be, we have no doubt that by means of the receiver's possession of the property, and the due publication, etc., of the summons, the court acquired jurisdiction to subject the property seized to the satisfaction of its lawful judgment. According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof and so warned of the purpose of the seizure; to accomplish this object the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment, and it is common practice to apply property which has been attached in the course of an action in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding in rem. Several recent cases illustrate this conclusion; most of them relate to the effect of legislation such as sections 412 and 749 of the Code of Civil Procedure: *Hanscom v. Hanscom* (Colo. App.), 39 Pac. Rep. 885; *Thurston v. Thurston*, 58 Minn. 279, 287; *Corson v. Shoemaker*, 55 Minn. 396; *Bennett v. Fenton*, 41 Fed. Rep. 283; *Single v. Scott etc. Co.*, 55 Fed. Rep. 553; *Miller v. Jones*, 67 Hun, 281; *Arndt v. Griggs*, 134 U. S. 316; *Plumb v. Bateman*, 2 D. C. App. Cas. 170; *Bragg v. Gaynor*, 85 Wis. 470. The case last cited was a creditor's bill to reach certain debts evidenced by notes and mortgages executed by residents of the state to Gaynor, and by him assigned in fraud of Bragg, a judgment creditor; both Gaynor and the fraudulent assignee were nonresidents, were served with process out of the state, and failed to appear; the court held that such debts were "property" within the state within the meaning of a statute like in this particular to section 412 of our Code of Civil Procedure, as amended

in 1893, and that the service of an injunction on the mortgagors, who were made defendants, restraining them from paying to the nonresident creditor, brought the debts under the control of the court, so that its judgment avoiding the assignment and appointing a receiver to collect the debts and apply the proceeds to the payment of Bragg's demand against Gaynor was valid. We see no essential difference as concerns the question of jurisdiction between that case and the present.

4. It is contended that a portion of the complaint introduced with the words "for a separate and second cause of action, plaintiff avers," etc., and which contains virtually all the allegations of the pleading relating to the fraudulent transfers from Owen to James Murray, is insufficient as a statement of a cause of action in that it fails to allege the husband's failure to provide for the wife's support. The complaint is loosely drawn; but we think it apparent that it contains but one cause of action, and that the portion thereof to which appellants point this objection is not a real attempt to state a second transaction intended as an independent ground for plaintiff's suit, but is only a detail of matters tending to show the extent, form, and nature of the relief to which she is entitled upon her single cause of action, viz., her husband's desertion and his failure to maintain her; and that the words designating it "a separate cause of action" should be disregarded as an error which does not affect the substantial rights of the parties: Code Civ. Proc., sec. 475.

5. It was error to cancel the deed made by Evans and Man-court to James Murray; it is not mentioned in the complaint, and for anything appearing Owen Murray had no interest in it. So the lease to Smith should not have been canceled; Smith was not made a party to the action; he had a right to an opportunity for a hearing, however fraudulent may have been the contract of lease. ²⁷⁸ We think, also, that the court had no power to require said Owen to execute a bond in favor of plaintiff conditioned for the payment of the alimony allowed to her; no obligation upon him personally can be imposed by the judgment (*De La Montanya v. De La Montanya*, 112 Cal. 101; 53 Am. St. Rep. 165), and the power of the court to secure the award to plaintiff is limited to the property within its control. The court should not have disturbed the transfers to James Murray any farther than the exigencies of the decree in favor of plaintiff required; any property not needed for securing the maintenance allowed to her, and which can be restored to the person from whom the receiver took it, as provided in the judgment, is that much

which, as between defendants, belongs to James Murray. The court should have declared precisely what part of the property was to continue in the hands of a receiver, or otherwise subjected to the satisfaction of the judgment, and the remainder, if any, should have been wholly exempted from the effect of the judgment.

So far as the facts are disclosed by the record, we see no error in the direction that the receiver pay a physician's bill incurred by plaintiff; it must be assumed that this was found to be part of the necessary maintenance of plaintiff, which was the very purpose for which the funds were in the hands of the receiver: See *Fox v. Hale etc. Co.*, 108 Cal. 475; *Robinson v. Robinson*, 79 Cal. 511.

If this were an action for divorce as well as maintenance, we should say that the difficulties attending a continuing allowance under the circumstances are such that it would be better to award the plaintiff absolutely a gross sum, or part of the property in question, as in *Robinson v. Robinson*, 79 Cal. 511, but, as possibly the cohabitation of the parties may be resumed, we think the cause should be remanded, with instructions to the court below to modify and amend the judgment in the particulars wherein we have shown it to be erroneous, ²⁷⁹ and as so modified and amended it should stand affirmed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify and amend its judgment in the particulars wherein it is shown by said opinion to be erroneous, and as so modified and amended it will stand affirmed.

Garoutte, J., McFarland, J., Van Fleet, J., Beatty, C. J.

Harrison J., and Temple, J., dissented.

JURISDICTION OVER NONRESIDENTS — CONSTRUCTIVE SERVICE.—A personal judgment cannot be rendered against a nonresident who has not been served with process in the state: *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 684; 54 Am. St. Rep. 573, and note.

RECEIVERS, WHEN AND OVER WHAT PROPERTY MAY be appointed is discussed in the extended note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 482.

HUSBAND AND WIFE — CONVEYANCES IN FRAUD OF WIFE.—Conveyances of realty made by a husband for the purpose of defeating the wife's marital rights are fraudulent and void as against her: *Walker v. Walker*, 66 N. H. 390; 49 Am. St. Rep. 616, and note.

PETERS v. BOWMAN.

[115 CALIFORNIA, 345.]

THE OWNER OF LAND IS ORDINARILY UNDER NO DUTY TO KEEP HIS PREMISES SAFE FOR TRESPASSERS.—The exceptions to the rule arise when he maintains on his land something in the nature of a trap or other concealed danger, known to him and of which he has given no warning, and also when there has been something in the nature of a wanton injury to a trespasser. The rule is applicable to children as well as to adults.

LANDOWNER'S LIABILITY FOR PONDS OF DEEP WATER.—If a pond of water exists on premises adjacent to a public highway, or is created there by the action of a municipality in grading a street, the landowner is not answerable for the death of a child which goes to such pond without invitation, and is drowned therein.

George D. Collins, for the appellant.

Myrick & Deering, for the respondent.

³⁴⁷ **McFARLAND, J.** This action was brought by plaintiff to recover damages for the death of his infant son, who was drowned in a pond of water upon a lot of land owned by the defendant, Bowman. The jury returned a verdict for the defendant; and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The facts are practically undisputed and may be stated briefly; Defendant owned the lot in question and resided on it for several years prior to 1889. It was part of what is known as Ashbury Heights, in San Francisco. The land sloped toward the west, and on the westerly side fronted on Ashbury street. It does not appear whether or not it was in a thickly settled neighborhood. In its natural condition, the surface water which came from the lot flowed off through a gully across Ashbury street (over which there was a small bridge) and emptied into a pond a couple of blocks away. At some time prior to 1889, the city of San Francisco graded Ashbury street and threw up an embankment along the street and across the gully, and on the westerly side of said lot, to the height of eight or ten feet. This prevented the flow of surface water from the lot, and, on this account, defendant removed his residence, in 1889, to an adjoining county. From that time until 1894, when the boy was drowned, the surface water, being stopped by said embankment, would form, during the rainy season, a pond, which disappeared during the dry season. Defendant did nothing to create the pond, or to prevent ³⁴⁸ the water from flowing away; and, so far as he is concerned, it may be considered as a natural pond. The lot was not in-

closed by a fence or otherwise. After defendant removed his residence he did not often visit the lot, and did not give permission to or invite anyone to go upon it; but children did visit it and play upon the pond, and he must be presumed to have known that fact. He drove children away once, and a policeman did the same several times. The plaintiff knew of the existence of the pond, and knew that his son knew of it, and he "never told him not to go rafting on the pond." The son was over eleven years old, and was "a bright, active boy, an intelligent boy for eleven years, more so than the average boy of that age." He lived with his father, the plaintiff, on Castro street, "four or five blocks over the hills" southerly from the pond. He had been at the pond often before the day of the accident. He was allowed by his father to run on the streets. On February 16, 1894, he went with two other boys to the pond, and while floating on the pond on a rudely constructed raft made of railroad ties, and when running along one of the timbers, he fell off and was drowned. They went onto the pond from the southeasterly side—the side farthest away from Ashbury street.

Upon these facts the verdict was right; and a verdict for plaintiff would have been unwarranted.

The deceased boy was, at the time of the accident which caused his death, a trespasser on the land of defendant; and the general rule undoubtedly is, that the owner of land is under no duty to keep his premises safe for trespassers. The rule has been applied also where there was an implied license: *Schmidt v. Bauer*, 80 Cal. 565. The exceptions to the general rule are instances where the owner maintains on his land something in the nature of a trap or other concealed danger, known to him, and as to which he has given no warning to others; and instances where there had been something in the nature of a wanton injury to a trespasser, ³⁴⁹ as where the owner had set spring guns on his premises by which the trespasser had been shot. There is also the instance of an excavation adjoining a public highway into which a traveler on the highway, where he had the right to be, had accidentally fallen. There are other exceptions not necessary to be here mentioned. And the general rule applies to children as well as to adults, with some exceptions hereinafter noticed. "The rule is that ordinarily the owner of premises owes no duty of immunities to trespassers, though the latter be infants": *Whittaker's Smith on Negligence*, 2d ed., 67, note, and cases there cited.

Plaintiff seeks to take this case out of the principle above

stated by applying to it what is now known as the rule of the "turntable cases." That rule, which is a marked exception to the general principle, has been approved in many of the states, and in others has been repudiated. It must be taken as approved in this state by the decisions of this court in *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, and other cases cited by appellant. The rule originated in a case where a railroad company had erected on its land, near a public way, a turntable, and left it unlatched and unprotected, and young children, attracted by the turntable, went upon it to play and started it in motion, whereby one of them was injured; and the rule as thus applied rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that, therefore, the railroad company was liable for legal negligence in erecting it and leaving it exposed as an attraction to children, and a temptation to them to intermeddle with it: See *Barrett v. Southern Pac. Co.*, 91 Cal. 296, and cases cited on page 303; 25 Am. St. Rep. 186. But the rule of the turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not ³⁵⁰ be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds. It has also been applied to a few other cases where the owner, by some affirmative act, has caused some artificial danger to exist on his premises, as in the case of *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, cited by appellant, where the defendants had "stacked a large quantity of lumber in one large and irregular pile, so negligently and badly done that as the deceased, an infant, was playing near it, one of the timbers fell upon and killed him." It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural ob-

ject incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation; while it has been repeatedly held that in such a case no damages ⁸⁵¹ can be recovered. It was directly so held in *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, in *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, in *Hargreaves v. Deacon*, 25 Mich. 1, in *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365, and in the recent case of *Richards v. Connell*, 45 Neb. 467. In the last-named case the complaint alleged that the plaintiff's infant son was drowned in a pond on defendant's land in the vicinity of a public school, and the other facts alleged were almost exactly the same as those alleged and proven in the case at bar; but the trial court sustained the demurrer to the complaint on the ground that it did not state a cause of action, and, on appeal, the supreme court of Nebraska affirmed the judgment. The court, in its opinion, after reciting the averments of the complaint, say: "The single question presented by the record is whether the owner of a vacant lot upon which is situated a pond of water, or a dangerous excavation, is required to fence it or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists." After citing authorities, and distinguishing the cases from those where injuries result from lawful use of sidewalks and streets near dangerous excavations, the court further say: "We are referred to a number of cases which counsel argue sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows: 1. Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use

thereof Cases in which the owner has negligently left exposed dangerous machinery likely to attract children, and resulting in their injury. Illustrative of this class, which constitute a recognized exception to the rule, are the so-called turntable cases. 3. Cases where the ³⁵² plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition. But in no case has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration. It follows that the judgment of the district court must be affirmed." It will be observed that the supreme court of Nebraska recognizes the rule of the turntable cases, and distinguishes the case under consideration from those cases; and this is an answer to the contention of appellant that the authorities cited by respondent are from courts in which the rule of the turntable cases was repudiated. That rule was also recognized in the two cases above cited from Missouri and Michigan.

It may be well to notice briefly one or two of the other cases in point. In *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, the plaintiff's son fell into a pond on defendant's land which had been caused by water collecting in an excavation, and was drowned. The case was very similar to the one at bar, and the supreme court of Wisconsin, in delivering its opinion, says, among other things, as follows: "So the single question presented is: Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole, or pond, or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be unreasonable to so hold."

In *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, the eight-year-old son of plaintiff had fallen into a pond of water partly on defendant's ³⁵³ land, which had been formed by water collecting in an excavation which had been made by quarrying several years before the accident. The plaintiff had a verdict

for ten dollars, and the case was reversed. The court alluded to the cases which go upon the turntable doctrine, and said: "Whilst the authorities above cited recognize the liability of the owner, if a child is injured by dangerous machinery, so situated and exposed that it will naturally attract children, who cannot be expected to comprehend the danger of its use, and takes no precaution to prevent access to it, and thereby impliedly invites children to it, they distinctly deny the liability of a lot-owner under the facts disclosed in this case." The court also say that "the facts in evidence would have justified the court in directing a verdict for defendant."

In *Hargreaves v. Deacon*, 25 Mich. 1, a child had fallen into an uncovered cistern on defendant's land. The court, in its opinion, discussed at length the principles involved in the case, and, after noticing the decisions which declare the turntable doctrine, says: "We have examined the decisions with some care, and can find no support to any doctrine which would authorize a recovery in the case before us. We cannot help feeling much sympathy for the sad case of a child who was only following the natural and innocent curiosity of his age when he met with the accident which caused his death. But there is nothing to indicate any wanton or inhuman disposition in the defendants, and no illegality in the management of their business, and they have violated no right of the plaintiff or his intestate."

In *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365, plaintiff's son, eight years old, had fallen into a cistern on defendant's land which had been abandoned, but had once been used in connection with brickmaking. The court, in delivering its opinion, among other things, say: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall, as ³⁵⁴ in *Hydraulic Company v. Orr*, 83 Pa. St. 332. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusement. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it, or to fill up their

ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is a part of the boy's nature to trespass, especially where there is tempting fruit; yet I have never heard that it was the duty of the owner of a tree to cut it down because a boy trespasser might possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

The foregoing are a few of the many authorities which are particularly applicable to the case at bar, and show that in a case like this there can be no recovery. Under these circumstances, it is useless to consider the points raised by appellant on the instructions of the court on the subject of the contributory negligence of plaintiff, and of the boy who was drowned. Under no view of the case could a verdict for the plaintiff be sustained.

The judgment and order appealed from are affirmed.

Henshaw, J., and Temple, J., concurred.

³⁵⁵ A petition for a hearing in Bank having been filed, the same was denied on the 19th of January, 1897, and the following opinion rendered thereon:

BEATTY, C. J. A rehearing of this cause is denied, but the statement contained in the Department opinion, to the effect that no similar case had been cited in which damages were allowed, requires correction. The case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, was noted on the margin of appellant's brief, but escaped attention. There are circumstances which distinguish that case from this—particularly with respect to the culpability of the defendant, but the similarity is sufficient to justify counsel in his claim that his position is supported by a case in point. I can only say that the reasoning of the opinion in that case has failed to convince me, and that the decision stands alone and without other support than may be found in the turntable cases from which the supreme court of Illinois was unable to distinguish it. I think, however, that

there is a distinction which relieves us of the necessity of extending an exceptionally harsh rule of liability to such a case.

A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly, no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally, ~~and~~ must be created in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the turntable cases does not rest upon a principle so broad, and of such rigid application, as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character. But the owner

of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist. In the Illinois case cited by counsel, the city of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterward filled up ³⁵⁷ with water. It might be granted that that case was well decided and the principle of the turntable cases properly applied, without holding that this defendant is similarly liable. There the existence of a pond in a thickly peopled quarter was due to the act of the party charged. Here, the existence of the pond was due to the exercise, by the city of San Francisco, of a power and authority which the defendant could not lawfully resist. By the act of the city, and without any fault on his part, his lot was converted into a pond. He might, it is true, have filled it up; but he was no more bound to do so than if it had been a natural pond, because it was in no respect more of a nuisance than it would have been if it had been there before the city was laid out.

The facts being undisputed, it is the province and the duty of the court to decide, as matter of law, whether a defendant has been guilty of culpable negligence, and I think that it would be most unjust to hold that in this case the defendant has omitted any duty that he owed to the child of plaintiff.

The case of *Malloy v. Hibernia Bank* (Cal. April 22, 1889), which is also much relied upon by counsel, was altogether different in its circumstances, and the culpable negligence of the defendant was clear and evident.

Rehearing denied.

REAL PROPERTY—LANDOWNER'S LIABILITY.—The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, or those who may go upon them uninvited from motives of private convenience in no way connected with the owner: *Railway Co. v. Ferguson*, 57 Ark. 16; 38 Am. St. Rep. 217. A private owner or occupant of land is not required to keep his premises in a safe condition for the benefit of trespassers or those who come upon them without invitation, either express or implied, and merely seek to gratify their pleasure or curiosity: *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, and note. The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon such grounds, and that from the peculiar nature and exposed condition of something thereon it is reasonable to anticipate an injury to a child such as in fact occurred: *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 216, and note.

DE MARTIN v. PHELAN.

[115 CALIFORNIA, 538.]

MORTGAGE.—THE RELATION BETWEEN A MORTGAGOR AND MORTGAGEE is not fiduciary where the mortgage does not convey the legal title nor give the mortgagee any control over the estate.

MORTGAGE—EQUITY OF REDEMPTION.—The purchase by a mortgagee of the equity of redemption from the mortgagor at a time when there was a great stringency in the money market, and therefore an inability to borrow money at a price greatly less than the purchaser was willing to pay if necessary to effect the purchase, the mortgagor not being aware that it was possible to obtain a greater price, is not fraudulent and will not support an action against the mortgagee for damages, though the premises were advertised for sale under the decree of foreclosure when the equity of redemption was thus purchased.

George H. Maxwell and R. M. F. Soto, for the appellant.

Frank J. Sullivan, for the respondents.

540 **TEMPLE, J.** This appeal is from a judgment upon demurrer to the complaint. The complaint contains averments to the effect that on the fourth day of November, A. D. 1881, plaintiff owned a certain tract of land which was then subject to mortgage liens, then owned by James Phelan. The amount due on said mortgages was \$196,000. The real estate was worth \$390,375. The plaintiff and her thirteen children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition 541 and also that her equity of redemption was worth at least \$45,500. Still, designing to take advantage of her distress and necessities, he first offered her \$4,000, and then \$10,000, and finally \$19,000, for her equity of redemption. The offers were successively made on different days, and, in the mean time, said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly, for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value, by taking an oppressive and unfair advantage of her necessities and distress.

Also that on the fourth day of November, 1881, decedent made her the offer of \$19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities she finally did accept said offer, and conveyed her

equity to him for said sum. She did not know that decedent had taken such advantage, or that he knew of her necessities and distress at that time, but that she discovered such fact on the twenty-seventh day of December, 1887.

It is averred that when defendant falsely represented that he would sell said property, unless she accepted \$19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same, unless he was unable to procure plaintiff's interests for \$45,500. He fully intended to offer her \$45,500 for her equity, if he could not procure it for less. This intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious.

The facts constituting the supposed fraud are: 1. Plaintiff was without available means, and in great financial distress; 2. Decedent had obtained a judgment ⁵⁴² foreclosing mortgage liens upon her land, amounting to \$196,000. Her land was worth much more than this, but, owing to a temporary stringency in the money market, she could not borrow more money upon the land or sell it for more than the mortgage debt; 3. Decedent knew that her equity of redemption was worth \$45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value, and his willingness to pay that sum provided she would not take less; 4. He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed; in the mean time making her successive offers for her equity of \$4,000, \$6,000, \$10,000 and \$19,000, which last offer she accepted, in ignorance that deceased would have given her more had she insisted upon it, and induced by her necessities and fears of losing her property in case of a sale under the decree.

It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan, to conceal from her the fact that he intended to offer her as much as \$45,500 for her equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her ne-

cessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel.

The real point in the case is, I presume, that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law, the mortgagee, ⁵⁴³ at least after condition broken, was the legal owner and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed, or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was threatened with a sale under the decree if she did not sell. Of course she knew, without being told, that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another, or to prevent the obtaining of a loan.

I can discover no element of fraud, oppression, or unfairness in the case.

The judgment is affirmed.

Henshaw, J., and McFarland, J., concurred.

IF WE ASSUME THAT THE OPINION in the principal case was given upon due consideration, it expresses a remarkable departure from what we have hitherto considered to be the law defining the relations between mortgagor and mortgagee, and regulating dealing between them respecting a transfer or release of the equity of

redemption. In the principal case, the judge writing the opinion said that the real point intended to be presented by the appellant was "that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities." The answer made to this point was: "1. In the first place, the relation between the parties was in no sense fiduciary. At common law, the mortgagee, at least after condition broken, was the legal owner, and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure, the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted, the mortgages had been foreclosed, and Phelan had only his decree." Two inferences may fairly be deduced from this language. The first is, that where, as by the system usually prevailing in the United States, a mortgage is a mere lien, and does not vest the mortgagee either with the legal title or a right to the possession, the relations between the mortgagor and mortgagee are not fiduciary; and second, whether this system prevails or not, if a suit is brought for foreclosure in which a decree is entered directing the sale of the mortgaged premises, the relations between the mortgagor and mortgagee cease to be such, and therefore the latter may deal with the former as with a stranger. Contracts between mortgagors and mortgagees to waive or release the equity of redemption of the former have been fully considered in the monographic note to *Bradbury v. Davenport*, 55 Am. St. Rep. 92. The case to which that note was written was decided by the same court as the principal case. The mortgage there under consideration was subject to the same statutory conditions as the mortgage considered in the principal case, nor does it appear that there was anything exceptional in the mortgage involved in *Bradbury v. Davenport*, 55 Am. St. Rep. 92, whereby the mortgagee was not given possession of the mortgaged premises nor placed in any position respecting it other than that flowing, as a matter of law, from the relations of mortgagor and mortgagee, where the mortgage created a lien only; and yet in the former case a transfer by the mortgagor to the mortgagee was set aside substantially on no other ground than that the consideration for the release of the equity of redemption was inadequate. In the principal case no notice whatever is taken of the decision reported in the preceding volume, and we are at a loss to know how the two decisions can be reconciled, and whether the latter is intended to overrule the former. It will be difficult to conceive a case in which it more clearly appears from the complaint, confessed to be true by the demurrer, that a mortgagee had taken advantage of his position for the purpose of coercing a conveyance from his mortgagor, and, if the decision in the principal case be cor-

rect, we cannot imagine any conduct on the part of a mortgagee in obtaining a release of the equity of redemption which would entitle the mortgagor to relief. It is true that the action was of a peculiar character. The mortgagor, instead of seeking to redeem from the mortgage or to have set aside her transfer of her equity of redemption, brought an action for damages; and we should not have thought it strange had the court declined to grant relief because of the peculiar nature of the action. It did not, however, rest its conclusion upon that ground, but affirmed in explicit terms that, when a mortgage did not convey the legal title nor give the mortgagee an immediate right of possession, the relation between him and the mortgagor was not in any sense fiduciary, and that the mortgagee might obtain and retain an advantage by oppression.

SMITH v. SAN FRANCISCO & NORTH PACIFIC RAILWAY COMPANY.

[115 CALIFORNIA, 584.]

CORPORATIONS, ONLY BONA FIDE STOCKHOLDERS MAY VOTE.—Under a statute requiring every voter at an election for directors of a corporation to be a bona fide stockholder having stock in his name on the stock-books of the corporation, persons in whose names stocks stand on such books, but to whom it was transferred by its owners to avoid their liability as stockholders for the debts of the corporation, are not entitled to vote.

STOCKHOLDERS, PRIVATE AGREEMENT TO CONTROL THE VOTING THEREOF.—If several persons purchase stock in a corporation under an agreement between them that it shall be voted as a unit for the term of five years at all meetings for the election of directors, and that the persons for whom it shall be voted shall be determined by such purchasers, or their survivors, and that, if any of such stock shall be sold, an agreement shall be exacted from the vendees thereof that it may continue to be voted pursuant to such agreement, a majority of such original purchasers have the right to vote the whole of such stock contrary to the wishes of one of their number, who still retains his interest therein. The agreement is valid, and none of the parties can withdraw therefrom.

CORPORATIONS—PROXIES.—NO PARTICULAR FORM of words is required to constitute a proxy. Like any other agency, an instrument creating it may be informal, but, if, in order to give effect to its language in view of the purpose for which it was executed, it is necessary to construe the instrument as creating an agency, such construction will be given.

CORPORATIONS.—A PROXY MAY BE MADE IRREVOCABLE FOR A TERM OF YEARS as the result of a contract between the purchasers of stock in the corporation that a majority of them, or their survivors, shall vote it as a unit during such term.

CORPORATIONS—PUBLIC POLICY—AGREEMENT FOR VOTING STOCK.—It is not in violation of public policy or any rule of law for stockholders owning a majority of stock in a corporation to cause its affairs to be managed in such a way as they think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies to so vote it in such a way as

will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or what officers they will elect, or they may unite in the appointment of a single proxy to effect their purpose.

CORPORATIONS—VOTING TRUSTS.—An agreement between stockholders of a corporation to vote their stock as a unit is not invalid because in restraint of trade.

CORPORATIONS.—THE VOTING POWER OF STOCK MAY BE SEPARATED from its ownership, as when a proxy is given, or an agreement made upon a sufficient and valid consideration by which some person is authorized to vote stock, though not the owner thereof.

W. S. Goodfellow, Jesse W. Lilienthal, and G. W. McEnerney, for the appellants.

Page, McCutcheon & Eells, for the respondents.

⁵⁸⁷ **HARRISON, J.** At the election for directors of the San Francisco & North Pacific Railway Company, which was had at the annual meeting of the stockholders held February 25, 1896, the votes offered by Peter Gundecker, G. E. Wagner, and Sidney V. Smith, in whose names certain shares of stock stood on the books of the corporation, were rejected, and, at the close of the election, the chairman of the meeting announced that Antoine Borel, A. W. Foster, Andrew Markham, P. N. Lilienthal, George A. Newhall, James B. Stetson, and John L. Howard, had been duly elected directors of said corporation for the year then next ensuing. The votes of Gundecker and Wagner were rejected upon the ground that they were not bona fide stockholders in the corporation, and the vote of Smith was rejected upon the ground that by virtue of a certain agreement between him and two other stockholders—Foster and Markham—the stock of the three had been pooled for the term of five years, to be voted as a unit, and was cast in pursuance of that agreement. If the votes thus rejected had been received, the election would have resulted in the choice of Smith as one of the directors instead of Lilienthal. The present action was brought under section 315 of the Civil Code, for the purpose of having it declared that Smith instead of Lilienthal was elected a director at said election. The superior court found that Gundecker and Wagner were bona fide stockholders, and that their vote should have been received, and that the agreement by Smith with the other stockholders did not preclude him from the right to vote the stock standing in his own name as he might choose, and that the vote by the other stockholders for his stock was unauthorized, and his own vote should have been received. Judgment was thereupon rendered that Lilienthal had not been chosen as

a director, and was not entitled to exercise the office, and that at the said election Smith was chosen one of the directors, and was entitled to be so recognized. A motion for a new trial on behalf of the defendants was denied, and from both the judgment ⁵⁸⁸ and the order denying the new trial appeals have been taken.

1. The Gundecker and Wagner Stock.—At the time of the election, and for more than ten days prior thereto, there was standing upon the books of the corporation four thousand two hundred shares of stock in the name of Peter Gundecker, and four thousand four hundred and eighty-five shares in the name of G. E. Wagner, and they were represented at the election by Antoine Borel, to whom they had given their proxy. When their votes were tendered by Borel a protest was made against receiving them, upon the ground that neither of them was or had been a bona fide stockholder of the corporation, and thereupon the protest was sustained and the votes rejected. In support of the action of the chairman in rejecting these votes, it is alleged in the answer herein that neither Gundecker nor Wagner ever held or owned any shares of stock of the corporation, or was ever a bona fide stockholder therein; that the true owner of said shares was the firm of Ladenburg, Thalman & Co. of New York. At the hearing before the court an affidavit for a continuance was presented for the purpose of enabling the defendants to take the depositions of certain witnesses in New York, including Gundecker and Wagner, to establish this issue, and it was admitted by the plaintiffs that, if the witnesses were present, they would testify to the matters set forth in the affidavit, reserving, however, their objections to its materiality. The matters set forth in the affidavit are that, at the time Gundecker and Wagner gave their proxies to Borel, they were neither of them holders or owners of any stock in the defendant railway company, and had never held or owned any stock in said company, and that, at the time the shares were transferred to their names, they belonged to the firm of Ladenburg, Thalman & Co., who caused said shares to be so transferred to the names of Gundecker and Wagner, as dummies, so as to avoid for said Ladenburg, Thalman & Co. the liability of a stockholder for the debts of said ⁵⁸⁹ defendant railroad company. When the defendants offered this admission of the plaintiffs in evidence, the court excluded it upon the objection of the plaintiffs that it was immaterial. For the purpose of determining the present appeal, it must be assumed that, if the witnesses had testi-

fied in accordance with the admission of the plaintiffs, the court would have found the facts in accordance with their testimony, so that the real question to be determined is, whether, if such were the facts, the votes of Gundecker and Wagner should have been received, and this depends upon a proper construction of the provisions in section 312 of the Civil Code, requiring every voter at an election for directors in a corporation to be "a bona fide stockholder, having stock in his own name on the stock-books of the corporation, at least ten days prior to the election."

The act in relation to corporations passed at the first session of the legislature of this state (Stats. 1850, p. 347) made different provisions for different kinds of corporations, and also different requirements on the part of the stockholders for the election of directors. The provision generally made in this respect was that the directors should be elected by the stockholders, and that "each stockholder shall be entitled to as many votes as he owns shares of stock in the company": Stats. 1850, secs. 35, 105, 124, 187.) The chapter relating to railroad companies provided (Stats. 1850, sec. 59) that the stockholder must have owned his stock for thirty days next preceding the election in order to entitle him to vote, and that "no stockholder shall vote at any such election upon any stock except such as he shall have owned for such thirty days"; and the chapter relating to bridge companies provided (Stats. 1850, sec. 159) that the stockholder could vote only upon such stock as he had "owned absolutely, or as executor, administrator, or guardian, for thirty days previous to such election." The act authorizing the incorporation of mining and manufacturing companies passed in 1853 (Stats. 1853, sec. 5, p. 87) provided that "each ⁵⁰⁰ stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock," and further provided (Stats. 1853, sec. 11): "Whenever any stock is held by any person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder." The statute, so far as it related to the incorporation of railroad companies, was revised and re-enacted in 1861 (Stats. 1861, p. 607) and section 5 of that act provided that directors should be elected "by a majority of the votes of the stockholders being present in person or by written proxy; and every stockholder being so present, either in person or by proxy, at any election for directors, shall be entitled to give one vote for every share of stock which he may have owned for ten days next preceding such election; but no stockholder shall vote at any such

election upon any stock, except such as he shall have owned for ten days." In none of these statutes was it provided that the stock owned by the stockholders should stand in his name upon the books of the corporation.

At the adoption of the Civil Code in 1872 the legislature sought to bring into a single system applicable to all corporations, so far as practicable, the entire method of corporate organization and management, and, having provided that directors should be chosen annually by the stockholders, provided in section 307 that every stockholder should have the right to vote in person or by proxy the number of shares standing in his name, "as provided in section 312." It is provided in section 312 that to entitle a person to vote he must be "a bona fide stockholder, having stock in his own name on the stock-books of the corporation at least ten days prior to the election." It is thus made as a requisite of the right to vote that the voter shall not only be registered as a stockholder, but that he shall have been so registered for at least ten days prior to the election, and that he shall also be a bona fide stockholder at the time of the election. The provision in section 313 that the ⁵⁹¹ shares of stock of an estate of a minor or insane person may be "represented," that is, voted, by his guardian, and of a deceased person by his executor or administrator, indicates that these officers would be entitled to vote the stock without having it transferred to their own name: See *In re Election of Cape May etc. Co.*, 51 N. J. L. 78. These provisions are substantially those previously existing in reference to railroad corporations, although there is added thereto the requirement that the stock must stand in the name of the voter, and, while the requirement of section 159 of the act of 1850, that the stockholder must have owned the stock "absolutely" in order to entitle him to vote, is not preserved, it is now required that in all cases he must at the time of the election, be a "bona fide" stockholder. The legislature having included this as a requirement, it must be assumed that something was intended thereby in addition to what was previously made a qualification for voting, and it is the duty of courts to ascertain this intention, and construe the words accordingly. Under the previous statutory provisions in this state it had been decided in *Allen v. Hill*, 16 Cal. 113, that the surviving partner of one in whose name stock belonging to the partnership was registered upon the books of the corporation had the right to represent and vote the stock at an election of officers, and that the administrator of the partner in whose name the stock was

registered did not have such right, saying that "the real owner of stock should be entitled to represent it at the meetings of the corporation, and the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In that decision the court pointed out the distinction between the statutes of this state, and in those states in which the transfer-books were made the exclusive evidence of the right to vote, and it is reasonable to suppose that the provision that the voter must have stock standing in his own name was made in view of that decision.

⁵⁹² As early as 1825 the legislature of New York provided by statute that the transfer-books of an incorporated company should be the evidence of who were the stockholders of the company, and should determine the right of any claimant to vote at an election. This statute has remained in force in that state, and has been followed in other states by similar statutes, or, in the absence of any statute on the subject, by accepting the decisions thereunder as authority for determining the same question: See *Downing v. Potts*, 23 N. J. L. 75; *Hoppin v. Buffum*, 9 R. I. 513; 11 Am. Rep. 291; *State v. Ferris*, 42 Conn. 560. Under this statute it was held that a registered stockholder had the right to vote at an election of officers, even though he held the stock as trustee for others without any beneficial interest therein (*Ex parte Barker*, 6 Wend. 509), or, though his stock had been hypothecated for its full value (*Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525); and when the stock belonging to a bank was registered in the name of its cashier, who held it merely in trust, and who had been superseded by another in that office, it was held that the vote of the registered stockholder should be received in preference to the vote tendered by his successor: *In re Mohawk etc. R. R. Co.*, 19 Wend. 135. It was, however, held in *Ex parte Holmes*, 5 Cow. 426, that where stock belonging to the corporation itself was registered in the name of an individual, he would not have the right to vote it, for the reason that since it was the property of the corporation it could not be voted at all: See, also, *Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237. It may be assumed that at the adoption of the Civil Code in 1872, the legislature was aware of the provisions of the statutes of New York, and of the decisions thereunder, and those of similar import in other states, to the effect that the one who was registered as a stockholder was entitled to vote, even though, at the time of voting, he had no interest in the stock, and the insertion of the word "bona fide" as an element of his qualification, in addition to

the other requirements of the section, ⁵⁹³ was doubtless made in view of such decisions. Under a statute requiring him to be the owner, it has been held sufficient that he be registered as the owner, and that the corporation could not inquire into the character of his ownership, but when he is required to be a "bona fide stockholder," the nature of the title under which he holds the stock is open to inquiry. It will be observed that the requirement is not that he shall be a bona fide "owner" of the stock, but that he shall be a bona fide stockholder. The provision in section 298 of the Civil Code, that the owners of stock are called stockholders, does not need or admit of the construction that only those are stockholders who are owners of stock. This section does not purport to be a definition of the term "stockholder," or to limit its extent, as would have been the case if it had said that stockholders are those who own the shares of stock in a corporation, but is consistent with holding that others may be stockholders than merely those who are the owners of the stock, and for the purpose of avoiding such construction, section 312 requires the voter at an election to be a bona fide stockholder. One may be a bona fide stockholder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both toward the corporation and also toward his fellow stockholders, and yet he may not be the owner of the stock. The owner of the stock may have pledged it as security for his indebtedness, and the creditor may have caused it to be transferred to his own name upon the books of the corporation without changing its ownership: Civ. Code, sec. 2888; *Hawley v. Brumagim*, 33 Cal. 394. It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate, and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered ⁵⁹⁴ would be a bona fide stockholder: *In re Argus Printing Co.*, 1 N. D. 434; 26 Am. St. Rep. 639. The provisions of section 322 of the Civil Code, by which the liabilities of pledgees and trustees in whose names stock is registered are limited to that section, imply that such limitation does not exist in other relations which these persons sustain to the corporation, and corroborates the proposition that they are not to be precluded from voting at an election. Section 312 provides that "at all elections or votes had for any purpose, there must be a majority

of the subscribed capital stock represented, either in person or by proxy in writing." But if stock that is registered in the name of a pledgee, or of a trustee, or of an executor, cannot be voted, it might not infrequently happen that a majority of the stock would not be represented at an election.

This section received a construction in *Stewart v. Mahoney Min. Co.*, 54 Cal. 149, and it was there held that one in whose name stock was registered upon the books of the corporation, but who had no interest therein, and was not the owner of any stock in the corporation, had no right to vote the stock; that he was neither the proxy nor the representative of the owners of the stock, nor a member of the corporation, and was, therefore, not a bona fide stockholder. The construction then given by the court to this section has never been modified and must be regarded as a controlling authority in the present case. The case of *People v. Robinson*, 64 Cal. 373, involved only the construction of the act of 1853. It will be observed that in that case one of the considerations stated in the opinion upon which the decision was made was, that it did not appear that the right of the registered stockholder to vote as he did was challenged, or that his vendee attempted or claimed the right to cast the vote. That case, moreover, was not an action under section 315, but was in the nature of a quo warranto to oust the defendants from the offices of trustees.

It may not be easy, nor is it requisite under the facts ⁵⁹⁵ in this case, to formulate a definition of a bona fide stockholder which shall cover all cases, or to draw a line of exclusion by which the right to vote shall be determined; but we are very clear that one in whose name stock has been registered upon the books of the corporation, but who has never had any interest in the stock, and is only a dummy for the real owner, and when the object of such registration was for the admitted purpose of enabling the real owner to avoid certain statutory liabilities, whether such purpose would be effectual or not, is not a bona fide stockholder within the meaning of this section, and should not be allowed to vote at an election.

2. The Smith stock.—The exclusion of the vote tendered by Smith upon the stock standing in his name was by reason of the following facts: In February, 1893, the estate of James M. Donahue, deceased, was the owner of forty-two thousand shares or thereabouts of the capital stock of the defendant railway company, which the superior court of Marin county had ordered to be sold in the course of the administration of his estate. Prior to

the sale an agreement was entered into between Smith, Foster, and Markham for the purchase of this stock as an entirety, upon the representations of Smith that upon acquiring the shares an agreement would be made by them whereby, in order to secure the control of the management and business policy of the railway company, and for its prudent and economical management in the interest of all of its stockholders, the said forty-two thousand shares should, for the term of five years thereafter, be voted as a unit in the election of directors of said railway company. In pursuance of this agreement Smith and Foster, on the 24th of February, made their joint bid for the shares, offering to purchase them as an entirety for the sum of eight hundred thousand dollars and upward, and by order of court their bid was accepted, and on March 23d the sale was completed and the price paid. After the making of the bid, and before the consummation of the purchase and completion ⁵⁰⁶ of the sale, Smith prepared the agreement for the voting of the shares as a unit that had been contemplated by the parties to the purchase, and on the 22d of March the same was executed in triplicate between Smith, Markham, and Foster. By this instrument, after reciting therein that the parties thereto had purchased the forty-two thousand shares of stock, and had agreed to retain the power of voting the stock for five years, "so as to keep the control of the corporation from passing to persons other than themselves," it was "mutually agreed between said Foster, Markham, and Smith that they will, during said period, retain the power to vote said shares in one body, and that the vote which shall be cast by said shares, whether for directors or for any other purpose, shall be determined by ballot between them or their survivors." It was in the contemplation of the parties to the agreement that they might sell or otherwise dispose of some of the shares, and, accordingly, they made provision in this instrument for retaining the right to vote the stock so sold by them, and annexed thereto the form of an agreement to be taken by them from their vendees. This form or draft recited the purchase of the forty-two thousand shares by Foster, Smith, and Markham, and that, "for the purpose of keeping control of said road in the interest of themselves and of all persons who shall buy any portion of the stock from them," they have agreed that for the period of five years "they shall vote the said stock in one block" at all elections for officers. The purchase of the stock by Foster, Smith, and Markham was completed and the price therefor paid on the 23d of March, and twelve thousand three hundred and thirty-six shares of the stock were

transferred on the books to each of them—five thousand shares being left in the name of the Mercantile Trust Company, subject to some prior trust. Prior to the day for the election in 1896, a conference was called to be held between Foster, Smith, and Markham, upon proper notice therefor, to determine by ballot how the vote of the shares should be cast at the next ⁵⁹⁷ annual meeting for directors, and, in accordance with said notice, said conference was held, at which Foster and Markham were present, and, upon a ballot had thereat, it was determined that said shares should be voted for Markham, Newhall, and Lilienthal as directors. The foregoing matters are alleged in the answer of the defendants, and, at the trial, the defendants sought to introduce in evidence the agreement of March 22d, and offered to prove, in connection therewith, the matters set forth in their answer relative thereto; but upon the objection by the plaintiffs to this offer, “on the ground that said agreement was not a proxy, and did not provide that any of the parties thereto should vote the stock belonging to the other, and that it was revoked before the election and was invalid as against public policy,” the evidence was excluded, the court saying: “I will assume, for the purpose of my ruling, that it was a valid agreement, but that it was not an agreement which gave any authority to any other person to cast the vote of Mr. Smith.” As we have said with reference to the Gundecker and Wagner stock, for the purpose of this appeal it is to be assumed that the evidence offered by the defendants would sustain the allegations of their answer, and the sufficiency of these averments to authorize the exclusion of the vote by Smith is to be determined. It was shown at the trial that at the meeting of the stockholders, held on February 25th, Smith tendered a vote for the shares standing in his name, and, at the same time, Foster presented the vote of the same stock by himself and Markham in behalf of Smith. Mutual protests against the votes were made by different stockholders, and the vote cast by Foster and Markham was received and counted, and that cast by Smith was rejected. Smith also testified that, after receiving the notice for the conference to determine the ballot to be cast, he informed Foster and Markham that he did not recognize the validity or legality of the agreement, and that he withdrew from the same, and would not be bound by anything which they might do thereunder.

⁵⁹⁸ That the instrument of March 22d constitutes an agreement that the forty-two thousand shares are to be voted “in one body,” and that the parties thereto agreed that “they” would vote

the stock "in one block" is stated therein in express terms. By this instrument they also "mutually agreed" that "the vote" to be cast by said shares should be determined by ballot "between them" or their survivors. To "determine by ballot" is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots; and the "vote"—that is, the voting paper or ticket to be cast for the officers, which the parties agreed should be thus determined—is to be the same for the entire forty-two thousand shares. That by virtue of this agreement an authority was given by each of the parties to the others to determine "the vote" to be cast by the forty-two thousand shares of stock is too clear for argument. When they mutually agreed that they would "determine" between them the vote which "shall be cast" for directors, they declared by necessary implication that such vote should be cast in accordance with the results of that ballot, and that if either of them should fail to cast the vote as should be determined by the ballot, the vote so determined might be cast by the others. If we should hold that this instrument is to be construed as not giving authority to the majority of the parties thereto to cast the vote of the entire forty-two thousand shares of stock, as might be determined upon such ballot, we should be compelled to hold that the instrument was prepared in disregard of the agreement between the parties, and of the purpose for which it was to be executed. If there is any ambiguity in the language used for the expression of that agreement, it is to be construed so as to carry the agreement into effect, rather than to defeat its operation. No particular form of words is requisite to constitute a proxy: Morawetz on Corporations, sec. 486. Like any other agency, the instrument by which it is created may be informal, but if, in order to give effect to its language in view of the purpose for which it is ⁵⁹⁹ executed, it is necessary to construe the instrument as creating an agency, such construction will be given.

The instrument executed between the parties must, therefore, be held to be a proxy, and to authorize the vote of the forty-two thousand shares of stock to be cast in accordance with the determination of the majority of the parties thereto, and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it must be regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and

executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the forty-two thousand shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control. It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction, or agreed upon the purchase of the stock, except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a ⁶⁰⁰ sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either: *Hey v. Dolphin*, 92 Hun, 230.

Although the court in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto, that the instrument is invalid by reason of being against public policy, and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed; for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper.

"Public policy" is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as master of the rolls, said in *Besant v. Wood*, L. R. 12 Ch. Div. 605, that public policy is "to a great extent a matter

of individual opinion, because what one man or one judge might think against public policy, another might think altogether excellent public policy"; and in another case (*Printing etc. Co. v. Sampson*, L. R. 19 Eq. 465), the same jurist said: "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." It is not in violation of any rule or principle of law for stockholders, who own a majority of the stock in a corporation, to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, ⁶⁰¹ and, for this purpose, to appoint one or more proxies who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect, and they may do this either by themselves, or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members, and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase, by persons who contemplate no relation to each other further than that of owning stock in the same corporation. Such agreement would, in any case, be outside of the corporation and disconnected with the interest of every other stockholder, and, in either case, the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or

is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are done under ⁶⁰² it, and will be governed by other rules of law. Mr. Beach, in his treatise on Corporations, section 304, says: "The owners of shares may enter into agreements as between themselves to elect the officers of the company, and to manage its affairs as they or a majority of them shall determine, and it is held that agreements of that character are not illegal nor void as against public policy; for, as was said by the court in a leading case, their interests are identical with the interests of the minority of shareholders." The authority thus referred to is *Faulds v. Yates*, 57 Ill. 416; 11 Am. Rep. 24. In that case *Faulds* was the owner of a majority of the shares of stock in a corporation, and entered into an agreement with the defendants in the nature of a partnership for the working of a mine, and for the purchase by the defendants from him of two-thirds of his stock. It was provided in the agreement between them that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the company; and that, if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit so as to control the election. In an action for a dissolution and accounting of their partnership, it was contended that this portion of the agreement was void as against public policy, and was invalid for the reason that it was in conflict with the interests of the other stockholders. The court, however, held otherwise, using the following language: "There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons owning a majority of the stock had the unquestioned right to combine, and thus secure the board of directors and the management of the property. If one man owned a majority of the stock, he surely had the right to select the agents for its honest management." In *Hey v. Dolphin*, 92 Hun, 230, the parties were jointly interested in certain shares of stock which had been ⁶⁰³ issued to them in a single certificate, and it was agreed between them that the stock should not be sold, or in any manner disposed of, or the certificates surrendered, for a period of ten years, without their joint consent in writing, but should remain as first issued, "for the purpose of enabling the said parties of the first part to prevent the control and management of the company from passing over to persons who might be less qualified or less disposed to make the business of the said company a suc-

cess and its stock valuable." By the same agreement Dolphin was appointed a proxy to vote the whole of said shares at all elections, and the proxy was made irrevocable for ten years unless sooner revoked by joint consent. In an action brought for the purpose of having the agreement declared void, and that there be issued to the plaintiff certificates for one-half of the shares, the court held that the agreement was not void or against public policy, saying: "The object and purpose of the arrangement, as stated in the contract, is not of itself vicious, but rather the contrary. This is not a case where, as in some of the cases cited by the respondent, there is a combination of stockholders for the special benefit of some party, or where the power to cast the vote is in a party having no beneficial interest. The arrangement purported to be for the benefit of all the stockholders, and the attorney was one of the parties beneficially interested. It will hardly be claimed that a majority of stockholders may not combine to control an election of directors": See, also, *Havemeyer v. Havemeyer*, 11 Jones & S. 506; *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525.

In cases of "voting trusts," where the owners of stock transfer the shares to trustees, with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement and withdraw his stock at will; and it is also held that stockholders, ⁶⁰⁴ who become such after an agreement of this nature is entered into, are not bound by its terms, but will hold their shares freed from the limitations of the agreement: *Fisher v. Bush*, 35 Hun, 641; *Woodruff v. Dubuque etc. Co.*, 30 Fed. Rep. 91; *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525; *Griffith v. Jewett*, 15 Week. Law Bull. 419. In *Moses v. Scott*, 84 Ala. 608, certain stockholders had formed a voting trust, and placed their stock in the hands of four trustees, with power to vote the stock as a unit at all meetings, as three of them should think best, or, if they failed to agree, as three-fourths of the stock represented should determine, and had agreed not to sell their stock so pooled for three years. There was no consideration for this agreement other than the mutual promise of the several stockholders; and, while the court refused to enforce the agreement concerning the sale, upon the ground that it was in restraint of the free alienation of property, it said: "We cannot say there is anything per se illegal in an agreement entered into by and between certain

stockholders in a joint stock company by which they promise to vote together as a unit in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion, and it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote, when cast, is but the expressed wish of the stockholder, or at least must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleased."

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract ⁶⁰⁵ by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy, and there is nothing inconsistent with public policy for two or more persons, who contemplate purchasing certain property, to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made, and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into, and form a part of, the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement: *New England Trust Co. v. Abbott*, 162 Mass. 148; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; *Williams v. Montgomery*, 148 N. Y. 519; *Matthews v. Associated Press etc.*, 136

N. Y. 333; 32 Am. St. Rep. 741. The contract in *Fisher v. Bush*, 35 Hun, 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubtless, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding ⁶⁰⁶ a sale by either of his interests to one against whom his associates might have a reasonable objection: *Moffatt v. Farquhar*, 7 Ch. Div. 591; reported in 23 Moak Eng. Rep. 731. A stipulation of that character would not be illegal as against public policy, as it would be simply a provision assented to by all that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy; and it was held in *People's Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, that a by-law restricting the selection of proxies to stockholders was invalid; that the statute places no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies of itself that the voting power may be separated from the ownership of the stock, and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act. Under an appointment without words of limitation the proxy may ⁶⁰⁷ act against the interests of the stockholder, or even against the interests of the

corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person, while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power, and the attempt to authorize the exercise of an unlawful power. The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term: Shepaug Voting Trust cases, 60 Conn. 553, sometimes reported under the name of *Bostwick v. Chapman*; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178. We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree for the same consideration to cast the vote himself, and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In *Cone v. Russell*, 48 N. J. Eq. 208, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy for the purpose of securing and maintaining the control of the company was held invalid, for the reason that it was one of the terms of the agreement that the directors, to be elected under its provisions, should employ the one giving the proxy at a fixed salary during its existence. Such an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, ⁶⁰⁸ but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy. The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders." It was upon this principle that the agreements in *Hafer v. New York etc. R. R. Co.*, 14 Week. Law Bull. 68, *Guernsey v. Cook*, 120 Mass, 501, and *Fennessy v. Ross*, 5 N. Y. Super. Ct. App. Div. 342, were held invalid. The same principle was declared in *Gage v. Fisher*, 5

N. Dak. 297. In *Mobile etc. R. R. Co. v. Nicholas*, 98 Ala. 92, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected by the exercise of the voting power."

From the foregoing considerations it follows that the superior court erred in finding that Gundecker and Wagner were bona fide stockholders in the defendant railway company, and also in refusing to receive in evidence the instrument of March 22d, and the evidence offered by the defendants in connection therewith, for the purpose of sustaining the averments of their answer.

The judgment and order denying a new trial are reversed.

Van Fleet, J., McFarland, J., and Henshaw, J., concurred.

*** BEATTY, C. J., dissenting. I dissent from the judgment and from the conclusions of the court on both of the principal points decided.

The contract between Smith, Markham, and Foster was, in my opinion, void as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control. Its sole purpose and object was to give to a minority of the stockholders the power to control the affairs of the corporation against the will of the majority, and that object is secured by means of this judgment. There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation. As to the power of the chairman of a stockholders' meeting to refuse the vote of a registered stockholder upon the ground that he is not the bona fide owner of the stock standing in his name, I deny that it exists. As I construe sections 307 and 312 of the Civil Code, the registered stockholder must be allowed to vote; and if there is a claim that he is not the real owner of the stock which he has voted, that claim must be asserted and the remedy sought

in the proceeding defined in section 315. To hold otherwise is to invest the chairman of the meeting with a power capable of the grossest abuse, and in its nature purely arbitrary; for there is neither time nor means of trying the question of ownership at the meeting. Nor is there any necessity for investing the chairman or the members present with any such power. The real owner of stock can always have it properly transferred and registered, and the failure to do so is his own fault. Or, if a case may sometimes arise in which the right of the owner to have the stock transferred on the books is delayed or impeded, he may enjoin the apparent owner from voting it. In other words, he has his remedy in his own hands in most ⁶¹⁰ cases, and in the rare instances in which it is otherwise the courts will afford him a remedy. But there is no adequate remedy for the registered stockholder whose vote is excluded merely because the chairman of a stockholders' meeting may choose, without notice, without pleading, and without evidence, to sustain an objection of some other stockholder that he is not really the owner of stock which appears to be his.

In this case, however, the objection was made by parties who themselves had no claim to the stock offered to be voted. It had been legally issued and regularly transferred by the owner to the persons in whose name it stood on the books, and the objection was that they were dummies to whom it had been transferred for the purpose of avoiding the stockholders' liability to creditors, etc. This was not, in my opinion, a valid objection to the right of the holders of the stock to vote it. The owners had a right to put it in the hands of trustees, and their motive for so doing was not open to inquiry for the purpose of this election. Creditors of the corporation could not be deprived of their action against the real owners by the transfer, nor could the corporation be deprived of its right to collect assessments; but only the creditors and the corporation could question the transaction, and they only in a proper proceeding for the enforcement of their rights.

Rehearing denied.

Agreements to Control the Future Voting of Stock at Corporate Elections.

It is difficult to overestimate the importance of the decision in the principal case and the evils which will result, if its conclusions are generally adopted by the American courts. It, in substance, affirms two propositions. They are, that the officers presiding over an election for directors of a corporation, may: 1. Reject votes offered by persons standing on the records of the corporation as stockholders

thereof on the ground that they are not bona fide stockholders, because of some sinister purpose in the transfer of the stock to them; and 2. May permit persons to vote at such meetings stock which does not stand in their names, though the owners thereof in whose names it stands on the books of the corporation are present, claiming the right to themselves vote it, their right to so do being denied on the ground of some agreement entered into by them on some prior occasion.

In the first place, if the opinion of the majority of the court is sound, the officers presiding at every such election are in effect vested with jurisdiction to go behind the books and records of the corporation, and inquire into the motives inducing the transfer of shares of its stock, regularly made and entered upon its books, and to refuse to receive the votes of all persons appearing to be owners of such stock, if, in the judgment of the election officers, such motives were not such as to make the apparent transferee of stock a bona fide holder thereof, and, further, to inquire into alleged agreements made by various stockholders, controlling or prejudicing their right to vote their stock, and to determine not only whether such agreements existed, but also whether they have been so pursued, as that persons who are not owners of stock have become entitled to vote it to the exclusion of other persons who appear upon the books of the corporation to be, and who, in fact are, such owners. It is clear that the affirmance of such authority on the part of such election officers will give them, when they wish to control an election, the power to exclude from participation therein all shareholders whose votes are not in accord with the interests of such officers, and to permit the voting of stock by persons whose interests harmonize with those of the officers, though they are confessedly not stockholders, or, at least, not holders of all the stock which they are permitted to vote.

The decision in the principal case seems to be self-contradictory, for in determining that the election officers were authorized to refuse to permit the voting of what is called the Gundecker and Wagner stock, it was necessary to decide that no person is entitled to vote at an election who is not a bona fide stockholder, having stock standing in his name on the stock-books of the corporation at least ten days prior to the election; and in sustaining the election officers in excluding the vote tendered by the plaintiff Smith upon his stock, it was necessary to deny him the right to vote, though he was confessedly a bona fide stockholder, having stock standing in his name on the books of the corporation, and, furthermore, to permit his stock to be voted by other persons who were assuredly not bona fide owners thereof and in whose name it did not stand on the books of the corporation. We shall not, however, undertake to consider the whole case and the principles necessarily affirmed by it, but shall confine our attention to one question necessarily decided therein, namely, can a stockholder be bound by his agreement or irrevocable proxy to vote his stock at corporate elections in any particular manner, or to permit others to so vote it for him against his protest.

The question here presented has been but little considered, and is by no means settled, and perhaps there is no decision necessarily involving it, other than that in the principal case. At all events, that is the only case in which an attempt has been made to sustain the voting of stock by persons other than its owner while he was present, and insisting on the right to himself vote it. On both sides of the question there has been an attempt to use authorities and decisions not applicable to the controversy. Thus, as in favor of the right to disregard agreements or irrevocable proxies, cases have been cited which go no further than to affirm their invalidity, when affected with some purpose which it was clearly improper or unlawful for the parties to seek. This remark applies to those cases in which by agreement between a majority of the stockholders in several corporations their stock is transferred to trustees who are required to hold it in trust for the transferrers and to exercise the power of controlling the affairs of the corporation, the object of the scheme being to create an unlawful trust, or, in other words, to establish a virtual monopoly of the business for which the corporation was organized. These decisions may be sustained upon the ground that the monopoly sought is against public policy, and therefore they do not necessarily affirm that all schemes which separate the voting power of stock from its ownership are unlawful: *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541; *Gould v. Head*, 38 Fed. Rep. 880; *Gage v. Fisher*, 5 N. Dak. 297; *Clarke v. Central etc. Co.*, 50 Fed. Rep. 338. It is also well settled that, conceding the right of a complainant to purchase stock of a bank to control it in the interest of himself and his friends, this purpose on his part is not sufficient to take his contract of purchase out of the general rule that equity will not enforce the specific execution of a contract relating to personal chattels, and therefore that one who has contracted for the purchase of shares of stock cannot compel the specific performance of his contract, though he shows that without such performance he will be unable to obtain the control of the corporation which was contemplated when the contract of purchase was made: *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671; *Gage v. Fisher*, 5 N. Dak. 297. So, perhaps, those cases in which agreements have been declared illegal on the ground that their object was to secure employments and salaries in corporations may not necessarily affirm the invalidity of all irrevocable proxies, for the reason that an engagement that particular persons shall fill the offices of a corporation and draw designated salaries may be regarded as impairing the implied authority of stockholders to choose for their officers such persons as are best adapted to promote the welfare of the corporation: *Pohen v. Russell*, 48 N. J. Eq. 208; *White v. Thomas etc. Co.*, 52 N. J. Eq. 178.

On the other hand are cases relied upon to sustain agreements like that here in question, which go no further than to affirm that such agreements are not unlawful to the extent that the parties thereto will be denied relief based upon them, not involving the voting of the stock in the manner agreed upon, nor to the extent that

action taken by the concurrence of all the parties thereto shall be disregarded because of the pre-existing agreement. Thus *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, which was very much relied upon in the opinion of the majority of the court in the principal case, was a suit by Yates and Bunn against Faulds for the dissolution of a partnership alleged to exist between them, and for an accounting, and for a conveyance to each of them of an undivided one-third of a tract of land. The parties, in February, 1866, had executed articles of copartnership, in which stock owned by Faulds was valued at sixty thousand dollars, and the other parties agreed to purchase two-thirds of it. This stock was issued by a mining corporation known as the Chicago Carbon and Coal Company. In the agreement between the parties, it was provided that they would elect directors of the company, and would determine among themselves as to the officers and managers of the corporation, and in the event that they could not agree, that they would ballot among themselves for directors and officers, that the majority should rule, and that their vote should be cast as a unit, so as to control the elections of the corporation. The case did not involve the question whether, in the event of one of them refusing to vote the stock as the others wished, the latter should control the vote. The defendant in the suit insisted that, because of this agreement respecting the voting of the stock, the complainants ought to be denied all relief whatsoever. In other words, if he were correct in his theory, the complainants, though they had paid for two-thirds of the stock held by the firm, and had contributed their proportion of the funds of the partnership, were to be denied all relief whatsoever because a part of the scheme of the partnership was the voting of the stock as a unit. The decision of the court goes no farther than to affirm that if the partnership agreement were fraudulent and intended for bad purposes, that the stockholders who were a minority, if they suffered therefrom, had ample means of redress, and that, in the absence of any complaint upon their part, the complainants would not be denied the relief prayed for by them, namely, a dissolution of their copartnership with the defendant and an accounting with him respecting the partnership property and business. The case of *Barnes v. Brown*, 80 N. Y. 527, was also one in which the defendants sought to prevent a recovery by the plaintiff of a sum to which he was otherwise entitled upon the ground that the plaintiff, in making the contract upon which his right to a recovery rested, had stipulated for, and consented to, a change in the directors of a corporation, whereby those in office had resigned, and others were elected in their place, and it was insisted that the change so brought about was against public policy, and the contract based thereon void. It was held, however, that persons dealing with another who had the majority of the stock of a corporation, and who, in virtue thereof, had the right and the power to control it within the limits of its chartered authority, had the right to sell his stock and his interest in the corporation, and in doing so that he perpetrated no wrong upon anyone; that those who have the largest interest in a

corporation are entitled to control it; and that, upon the purchase of a controlling interest in a corporation, there was no fraud or wrong in making such changes in the directors thereof as would place the purchaser in control, and therefore, even if the plaintiff had stipulated for and wrought this change, it was not against public policy, and he was therefore not to be denied the benefit of the provisions of the contract which were in his favor. In *Railway Company v. State*, 49 Ohio St. 668, it appeared that stockholders in a corporation placed their stock in the hands of a depositary with directions to vote it as required by a committee appointed by themselves, and subject to their control; that thereafter an election was held at which it was proposed to vote such stock in favor of certain persons as directors; that, though objections were made by other shareholders to such voting, the vote was nevertheless received and voted in favor of certain candidates who were thereby elected to the office of directors; that the directors previously in office nevertheless insisted that the election was invalid, and refused to surrender their offices. The proceeding was in quo warranto to oust from office the directors who thus refused to surrender. It was held that the election was valid, because the agreement was but a convenient method by which distant and widely separated shareholders became enabled indirectly to participate "in the control and management of the company, and from which each could recede at any time, and demand the return of his stock without violating any term of the agreement. The depositary is a proxy required to vote the stock as directed by the committee; and he and the committee both derived their power from the shareholders by the same instrument, and, in the end, effectuate their wishes. Such an arrangement differs widely from an agreement whereby the stock is placed in the hands of trustees who are invested with the power of voting as their interests may dictate, irrespective of the wishes or direction of the owners. Such an agreement as the latter would be void as against the policy of our corporation law." In this case it should be remembered that the persons objecting to the casting of the vote in pursuance of the agreement were not parties to that agreement, and none of the parties thereto had withdrawn, or attempted to withdraw, from the agreement prior to the election in question. In the case of *Woodruff v. Dubuque etc. Co.*, 30 Fed. Rep. 91, the plaintiff sought an injunction against the voting of certain proxies which the officers of a corporation had obtained from stockholders thereof, and also against the voting of certain stock, the property of the complainant. It was decided that the complainant had no right to prevent the voting of proxies given to officers of the corporation by stockholders other than himself, but, as to his own stock, though he had deposited it with a firm, giving them authority to sell it, he nevertheless remained the owner of his stock; that "it remains, in effect, his, with a right to control the vote upon it, which apparently cannot be granted away separately from its ownership," and therefore, that an injunction should issue preventing the voting of his stock against his wishes. In *Brown v. Pacific Mail S. S. Co.*, 5 Blatch. 525, it appeared that a contract had been entered into whereby a large amount of the

stock of the corporation had been purchased and placed in the hands of Brown Brothers & Co., trustees, and that a written agreement had been made respecting such stock, to continue in force until December 1, 1868, whereby the parties thereto agreed not to sell their stock without having first offered to sell it to the rest of their associates, and whereby irrevocable authority was given to Brown Brothers & Co. to vote upon the stock at subsequent corporate elections, that certain other persons had been procuring proxies with the intention of voting them at an election about to take place, that these persons had made certain false charges respecting Brown Brothers and the purposes for which they would vote such stock, and that there was an intention to prevent Brown Brothers from voting the stock at an election then about to be held, and that the means to be adopted for the carrying out of such intention was to obtain an ex parte injunction from some court or judge forbidding Brown Brothers from voting the shares of stock held by them. The complainant sought an injunction whereby the defendants should be forbidden to resort to an ex parte injunction as a means of excluding Brown Brothers from voting the shares of stock which they held as trustees. The prayer of the complainant was granted as against the defendants within the jurisdiction of the court. In this case, however, it did not appear that any of the persons joining in the agreement whereby Brown Brothers were made trustees and authorized to vote the stock wished to withdraw therefrom, and the case, therefore, is merely one in which an injunction was issued to protect a person holding an unrevoked proxy from an unlawful scheme to prevent his exercising the authority conferred by it.

We shall now refer to decisions tending to support that in the principal case. Perhaps the most important of them is *Mobile etc. R. R. Co. v. Nicholas*, 98 Ala. 92. The Mobile & Ohio Railroad Company having made default in the payment of interest upon bonds secured by mortgages upon the railway property, proceedings in foreclosure were commenced, resulting in the appointment of a receiver and in orders for the sale of the property covered by the mortgages. At this stage of the proceedings, a scheme of reorganization was agreed upon, whereby the holders of various classes of indebtedness against the corporation agreed that the foreclosure suits might be discontinued, and the property restored to the custody and control of the corporation. Among the conditions of this agreement were that first mortgage bonds in the sum of seven million dollars should be given, and thereafter that nearly nine million dollars of debentures should be issued, characterized as the first, second, third, and fourth series, and that the stockholders of the corporation concurring in the agreement should execute an irrevocable power of attorney under which their stock should be voted until the payment or extinguishment of the debentures. A trust deed or agreement was executed reciting that certain of the stockholders, named therein, had as a further security of said debentures conveyed their stock to an investment company in trust and given it power and authority, irrevocable while any of said debentures remained outstanding, to represent and vote upon said shares of stock at all meetings of the stockhold-

ers of said railway company for the election of directors or for any other purpose for which such stockholders may be lawfully convened. After this agreement had been acquiesced in for several years, the stockholders, or some of them, denied the authority of the trustee to vote the stock, and themselves claimed that right, and sought an injunction to restrain the officers of the corporation from refusing to accept the votes of the complainant stockholders at a meeting to be thereafter held. The claim was made that the stockholders thus assenting to this agreement and transferring their stock as security for the debentures occupied toward those debentures and the corporate indebtedness the relations of sureties or guarantors, and had been released from their obligation as such, and become entitled to the surrender of their stock by virtue of certain changes made in the evidences of indebtedness, and whether this were true or not, that the irrevocable power of attorney depriving them of their right to vote was against public policy and nonenforceable. The decision of the court was against them upon both propositions; and it was held that the invalidity of proxies or agreements of this character did not depend upon whether there had been a separation of the voting power from the stockholders, but upon whether there was an unlawful purpose for which the proxy was appointed or an unlawful end attempted to be effected by the exercising of the voting power, and "If there were no precedents, upon principle, we should hold that, in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purposes to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them, except to preserve its own majesty and to conserve the greater interest of the public." The court then proceeded to consider the condition of the stockholders prior to entering into the agreement in question, and showed that that condition was such that they must necessarily have lost not only the voting power of their stock, but their entire interest in the assets of the corporation through the sale of its property under foreclosure, and that, to avoid this disaster to themselves, they had entered into the contract by which, in effect, securities for the corporate obligations had been given and the value of such securities augmented by vesting in the holders thereof, or a trustee for them, the voting power of the stockholders assenting thereto. The court was manifestly of the opinion that this voting power was a form of security in favor of the holder of the debentures which it was competent to give, and which, when given, could not be revoked by the resumption by the stockholders of their voting power.

Havemeyer v. Havemeyer, 11 Jones & S. 506, was an action brought to recover damages alleged to have been suffered by plaintiffs, through the depreciation in the value of their corporate stock, arising from the violation of an agreement entered into between them and the defendants in respect thereto. Plaintiffs, being the

owners of a great number of the shares of the capital stock of the Long Island Railroad Company, entered into an agreement whereby, at an election of the officers of the corporation, the defendants and others were elected directors. This change in the directory was brought about under provisions in the agreement, the object of which was to effect a sale of the stock held or controlled by both, and until such sale to secure the election of directors who would manage the company's affairs in the interests of the stockholders and thus improve the value of their stock. The defendants, as inducements to the entering into of the contract, disavowed any intention of selling their stock, and promised that no action should be taken respecting the sale of such stock, and that the stock of both parties to the agreement, should, if possible, be sold to a person then negotiating therefor. It was alleged that the defendants, instead of keeping their part of the agreement, took means to secure stock of the corporation other than that held by the plaintiffs, and disregarding the plaintiffs' interests, sold the stock of the defendants and that of other persons acquired by them, and constituting a majority of the stock of the corporation, and by means of this action the plaintiffs' stock had been depreciated from seventy-five per cent of its par value to not more than forty per cent. The defendants, by their answer, conceded that there had been a combination between all the parties to the action by which it was agreed between them that during a limited time neither party should make, or agree to make, any sale of the stock without the concurrence and participation of the other, but the defendants insisted that such agreement had terminated and the mutual obligations of the parties arising therefrom had entirely ceased before the doing of any of the acts of which the plaintiffs complained. In determining in favor of the plaintiffs' right of recovery, the court discussed the agreement upon which it was based, and determined that such agreement was not against public policy in any sense that forbade a recovery thereon by the plaintiffs, saying: "I am unable to perceive anything in this combination, or in the agreement therefor, which tends to defeat the rights of stockholders generally, or the interests of the public at large, as defined by that provision of the revised statutes which declares that the directors of railway corporations 'shall be chosen annually by the majority of the votes of the stockholders voting at such election.' Practically, the selection of candidates must precede an election, and it would often be difficult, if not impossible, not to make such selection without comparison of views, combination, concession, and concerted action. No formidable and effective opposition to an existing board, however obnoxious, could be organized without combination. An agreement to combine stock for the purpose of terminating mismanagement by a change in the direction through the instrumentality of a majority of votes, at a regular election, is not in conflict with the requirements of the law, and in no wise derogates from its policy. The well-established principles of law which have been invoked by the learned counsel for the defendants are not at variance with this view. They are intended to protect the public and the stockholders of corporations,

from combinations whose object is to corrupt official action, and to preclude control by the majority in interest. They are applicable to cases in which one of the parties stipulates to accord or secure to the other, for a consideration, some private or personal advantage not shared by the stockholders at large. Nothing of that kind appears to have been contemplated by the combination now in question. Its object was to stop mismanagement by the election of an honest board, who would manage the corporation in the interest of its members and so as to improve the value of their stock. No other advantage was to accrue to anyone concerned than such as would be common to all; and, as the combination contemplated the sanction and approval of a majority of the stockholders voting at the election, there was nothing in it which directly or indirectly tended to frustrate or interfere with the legal right of such majority to delegate to directors of its own choosing the management of the company's affairs."

Hey v. Dolphin, 92 Hun, 230, was a suit to have declared void an irrevocable power of attorney made by the plaintiff to one Dolphin and to have delivered to the plaintiff five thousand shares of the stock of the defendant corporation. Dolphin and Hey, being the owners of ten thousand shares of that stock, agreed that the certificates of such stock should not be surrendered or others issued in their place for the period of ten years without the joint consent of the parties, nor should any disposition or pledge of the stock be made during the time without such consent, and by the instrument evidencing this agreement, Dolphin was appointed a proxy to vote said shares of stock at the corporate elections, and it was declared that his power of attorney should remain irrevocable for a period of ten years, unless revoked by the concurrence of the parties. The complainant claimed that by virtue of this power of attorney the defendant had mismanaged the business of the corporation in various particulars to the great injury of the plaintiff and of other stockholders, and that the power of attorney was void by the laws of the state, and was contrary to public policy, and had been revoked by the plaintiff. The trial court decided in favor of the contention of the plaintiff, but on appeal its judgment was reversed, the appellate court declaring that the object of the agreement as stated therein was not vicious; that the case was not one where there was a combination of stockholders for the special benefit of some party, or where the power to cast the vote was given a party having no beneficial interest; that the parties to the contract were cotenants of the stock, and the agreement in question was in effect a waiver of their right to partition it, and that, as partners and as tenants in common, they had a right to deal with the corpus of the stock as a unit; that the stock being issued to the two together, a power of attorney or proxy was necessary in order to carry out their arrangement. Neither of the cases cited from the inferior court of New York appear to have been presented to the court of appeals of that state for consideration. It is true that a memorandum in 86 N. Y. 618 shows the Havemeyer case to have been affirmed by the court of appeals upon the facts and without the writing of any opinion by

the court therein. This appeal, however, manifestly did not present for consideration any of the questions of law determined by the court and reported in 11 Jones & S. 506. After that decision the case was retried, and resulted in a further decision reported in 13 Jones & S. 464, in favor of the defendants on the facts, and it was the decision in this latter case which was affirmed in the court of appeals. In it questions of fact only were involved, and the validity of the contract was not discussed.

The decision in *Fisher v. Bush*, 85 Hun, 641, seems to us inconsistent with that in the other New York cases. Ten of the shareholders of the Genesee Valley Canal Company signed an agreement, stipulating with one another that they would not sell, assign, pledge, or give a power of attorney to vote, in any way, shape, or manner, the stock respectively and individually owned in the corporation without the concurrent assent of all the signers of the instrument, and reciting in the agreement that it was made for the mutual protection of all the parties thereto, and to prevent the sale of the company's franchise by a majority of the members of the present board of directors who are, or who represent, a minority of the shares of the stock of the company. One of the parties having sold his stock to a third person, an action was brought by another party to the agreement, claiming that in consequence of such sale he had suffered damages specified in the complaint. This agreement was held to be void, because "in restraint of trade and against public policy," and because the covenant "is exclusive in its character, and is a mere naked promise on the part of each of the several owners that he will not sell the same, nor appoint an agent to represent him in selecting a board of directors." It was said: "The clause that neither will vote by proxy in the choice of a board of directors is pernicious, and is well calculated to concentrate in the hands of a few shareholders the power of selecting the executive and managing officers of the corporation, and deprives the owner of shares of one of the attributes of ownership, that is, of selecting agents and attorneys to counsel and aid him in the prudent and intelligent management of his property. If so disposed, either one of these covenantors could suppress the voice of his cocovenantors, and give to shareholders not represented in this contract the complete control of the corporate franchise."

So, far, therefore, as the decisions tending to sustain that in the principal case go, they consist of opinions rendered in the subordinate courts of the state of New York, which, at least in their reasonings, seem to us somewhat inharmonious, and the decision cited from the supreme court of Alabama. This latter may, perhaps, be maintained upon the ground that the stockholders who parted with their right to vote had no substantial interest in the corporate property, that its real ownership was vested in the persons holding indebtedness against it and the securities therefor, that the stock had, in fact, been pledged for the security of such indebtedness, and that one of the terms of the pledge had included the right of the pledgees during the continuance of the indebtedness, through the

voting of the stock, to manage the affairs of the corporation, in which they were the chief parties in interest.

It remains for us to refer to decisions directly or impliedly at variance with the views of the majority of the judges deciding the principal case. In the Shepang Voting Trust Case, 60 Conn. 553, it appeared that a syndicate had purchased a majority of the capital stock of a railroad company, and had placed it in a voting trust, to continue for five years, or until a consolidation should be effected with some other railway company; that a trust company was to act as the trustee, and was to vote the stock as directed by a committee of the syndicate. The object of the members of the syndicate was not only to extend the railroad, but also to make a profit for themselves out of construction contracts which they expected, through their control over the affairs of the corporation, to be able to make. Subsequently, certain persons interested in the capital stock notified the trust company that they revoked the powers given by the trust agreement, and demanded that the stock represented by certain certificates should be transferred to them. This demand being refused, suits in equity were brought, praying, among other things, that the contract be declared to be unauthorized, illegal, and void. The court deciding in favor of the complainants was much influenced by the consideration that the character of the trust, so far as the trust company was concerned, was a dry trust, it having no beneficial interests whatever in the shares of stock subject thereto. The court said: "But it is said that this voting trust is to run for five years, and that during the five years the voting power is not revocable except by unanimous consent of all holders of trust certificates. Can this be insisted upon against the demands of these trust certificate holders? Cannot these certificate holders revoke this voting power, notwithstanding this provision in the trust agreement? The court in the case of Griffith v. Jewell, 15 Week. Law Bull. 419, recently held the following language in a case similar in some respects to this one: 'If such demand be not complied with, the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is, that the control of stock companies shall be, and remain with, the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it. The owners of these trust certificates are, in our opinion, the equitable owners of the share of stock which they represent, and, being such the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees, as holders of the legal title, to vote in their stead if they choose; but when they elect to exercise the power themselves, the law will not permit the trustees to refuse it to them.' The propriety and soundness of the doctrine of this case, and the necessity of its application, can have no better or

more forcible illustration than in the facts and situation of the matter before us. The plaintiffs own ten thousand three hundred shares of the stock of this Shepaug road or its equivalent, and, if the contention of the defendants be sound, are shut out for several years from any voice in the election of officers and in the policy and management of the corporation. If I follow the doctrine in this case, as I feel compelled to, the conclusion must be that these plaintiffs, in the absence of any other well-grounded objection, have the right to revoke the voting power in this agreement."

In New Jersey, persons owning a majority of the shares of a corporation mutually agreed to execute, and did execute, a proxy purporting to be irrevocable for five years, authorizing the persons therein named to vote at all stockholders' meetings, and they on their part agreed to so vote that one of the parties to the agreement should be continuously employed as a manager of the corporation at a salary specified in the agreement. This agreement was held to be against public policy and therefore void, upon the ground that it was the obligation of corporators and shareholders to attend in person and execute the trust or franchise imposed upon them, and that the good of the public required that each stockholder should exercise his individual judgment as to all matters presented: *Cohen v. Russell*, 48 N. J. Eq. 208. A later case in the same state involved circumstances and questions more closely resembling those considered in the principal case. The holder of certain patents agreed with several capitalists to form a joint stock company, a portion of the capital stock of which was to be issued to him in payment of patents to be assigned to the corporation, another portion was to be issued to the capitalists for capital to be advanced by them in exploiting the patents, and the remaining shares were to be held in the treasury for sale. The shares other than those left in the treasury were agreed to be transferred to a trustee to hold for the term of ten years, and were by him to be so voted at elections of the directors that the patentee should nominate and elect a minority of the directors, and the holders of the remainder of the stock should elect the majority. After the shares reserved in the treasury were sold, and the purchasers thereof had also purchased of the patentee the greater portion of his stock, a suit was brought against the trustee to restrain him from voting at an approaching election the shares of stock thus held by him in trust and to have the agreements under which he held them canceled and set aside. The court, relying upon the general principle that the right to vote stock "cannot be separated from the ownership in such sense that the elective franchise shall be in one man, and the entire beneficial interest in another, nor to any extent, unless the circumstances take the case out of the general rule," declared the trust here in question void, and granted the relief sought by the complainants: *White v. Thomas etc. Co.*, 52 N. J. Eq. 178.

In North Carolina, the majority of the stockholders in a corporation executed an agreement for the purpose of borrowing money to pay off and discharge its indebtedness and of pledging the stock so held by them as collateral security for the moneys borrowed. It

was provided that the holders of a majority of the stock should have the right to instruct their trustees how to vote upon matters arising, or to arise, in any meeting of the stockholders. Some of the stockholders, after the execution of this agreement, sold their stock, and the purchaser brought an action to have the agreement declared invalid. The trial court refused the complainant relief, but its decision was reversed upon appeal to the supreme court. The court declared that it was now settled that "each stockholder, whether by himself or his proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which a number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy," and "the power to vote is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation. The 'pooling' arrangement, admitted to have been entered into by the majority of the stockholders in the present case, is contrary to public policy and voidable, and the plaintiff assignee of certain of the trustees' certificates is entitled to have his name entered as the owner and holder of the shares of stock represented by said trustees' certificates, and to have such shares issued to him, should the facts be found in accordance with his allegation, and to have the defendant restrained till the hearing from voting or controlling in any way the stock purchased by the plaintiff, or in anywise interfering with the plaintiff's right to vote, control, or dispose of said stock": *Harvey v. Improvement Co.* 118 N. O. 693. To the same effect, *Vanderbilt v. Bennett*, 19 Abb. N. C. 460.

A stockholder named Fisher owned a large number of the shares of the stock of a corporation, and held a proxy entitling him to vote for shares owned by a Mrs. Shaw, and the shares represented by his ownership and his proxy were sufficient to have enabled him to have controlled an election of directors about to be held. He was induced by one Gage to part with his control of the stock represented by the proxy under a promise that he might be allowed to vote it at the next annual stockholders' meeting. After he had thus parted with the control of this stock, he found that Gage, who owned other stock, was about to sell enough thereof to enable the purchaser to control the corporate elections, and, to prevent this sale, and the consequent loss of control over the corporation, Fisher agreed to purchase ten shares of such stock and pay therefor the sum of five thousand dollars. The sale was made, part of the purchase price paid, and a note given for the balance. Subsequently, a suit was brought upon this note, whereupon the maker interposed as a counterclaim the moneys which he had already paid for the purchase of the stock, offering to return such stock to the vendor, and insisting that the vendor had entrapped him by getting him to part with the proxy under an agreement that he might, nevertheless, have the privilege of voting the stock at the next election, and, by afterward threatening to violate such agreement, had rendered the

purchase of other stock necessary at the exorbitant price. The court held that the agreement for the voting of the stock by a party who did not own it was one which was invalid, and that the defendant was bound to know that such was the case, and therefore had no right to rely upon such agreement. The circumstances of the agreement, as stated in the opinion, show that one of the objects of the defendant in obtaining and retaining control of the corporation was to control a particular office. This was one of the reasons for holding the transaction void, but the court also stated that another reason was, every stockholder in a corporation had the right to demand that every other, if he desired to do so, should exercise at the very time of each annual meeting "his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract": *Gage v. Fisher*, 5 N. Dak. 297.

A feature usually accompanying voting trusts and other agreements by which control of the stock of a corporation is sought is, that the stock shall be retained by its owners, or by some person appointed for that purpose, for some specified time or until all concur in assenting to its transfer or disposition, and it has been suggested that such an agreement involves a restraint on the power of alienation, and is for that reason invalid: *Moses v. Scott*, 84 Ala. 608. The difficulty of maintaining this view is that none of the states, so far as we are aware, absolutely prohibit restraints upon alienation, and the only limitation imposed upon such restraints is, that they shall not suspend the absolute power of alienation for a longer period than during the continuance of lives in being at the creation of the restraint or limitation, and therefore a restraint upon the disposition of stock in a corporation may be sustained if it may be released by the concurrent act or assent of persons in being, or, in other words, by the joint action of the parties thereto: *Williams v. Montgomery*, 148 N. Y. 519.

In the principal case, an attempt was made to distinguish between what the court regards as agreements upon consideration and agreements having no other consideration than the mutual engagements or promises of the parties thereto, and the court determined that while the latter are nonenforceable, the former are obligatory and enforceable. We know of no reason for discriminating between different classes of valid considerations. The mutual promises of the parties to a contract have ever been regarded as a sufficient consideration for each other, and as considerations they are not less meritorious nor valuable than money or other property, except when they are promises to do something which the law declares must not be done. If the mutual promises of two or more owners of stock that it shall be voted as a unit or in any other way are not sufficient considerations for each other, it can only be because each promise is to do an unlawful act, and therefore constitutes no consideration whatever. No consideration can justify an unlawful act or an act condemned by public policy. Therefore, an agreement of the kind under consideration must still be invalid, though one or both of the parties added to his promise some valuable consideration

of a different character. The mutual promises of two persons to marry constitute a sufficient consideration for each other, and may entitle either party to maintain an action for a breach of the contract, or to recover or retain property given, or agreed to be given, in consideration of the promise of the other; but if the same parties should mutually agree to an illicit relation to be maintained between them, the contract would be void, whether the consideration consisted only of their mutual promises or had added thereto a moneyed or other property consideration. In other words, the vice is in the contract itself, from its inevitable tendency to impair good morals and to promote crime. In agreements of the class here under discussion, it cannot be material what was the character of their consideration, nor what were the means provided for reaching their object. It is not material whether the parties nominate a trustee and invest him with the dry legal title and the power of voting, or provide for a committee of their own number who shall decide how all shall vote, or agree upon a preliminary election among themselves to determine how the vote of all shall be cast at an approaching election, or devise some other plan of reaching their object. There can be but one object of such an agreement, and that is to enable persons who hold a minority of the stock of a corporation to exercise the power which the law contemplates shall belong to the majority only. Of course, this minority will ever insist that what it seeks is the welfare of the corporation. It will, perhaps, go farther, and demonstrate that its purpose is to promote the interests of the whole community. Trusts are philanthropical devices to cheapen commodities, and thereby to reduce the cost of living, but incidentally to augment the income of their promoters and reduce that of other people, so that they will probably be unable to obtain the commodities even at their reduced price. The object of persons who seek the control of corporations without becoming the owners of a majority of their stock, as disclosed by their evidence, is ordinarily the promotion of the prosperity of the corporations and the seeking of the welfare of the majority of the stockholders against their protest. This disinterestedness may occasionally exist, but is not sufficiently prevalent to warrant its acceptance as the basis of judicial action. Nor, in our judgment, can such action properly be founded upon what may be the personal motives of the parties to such a contract in each particular instance. The only proper subject of inquiry is, what may the contract permit the doing of, if the parties, or any of them, choose to press the privileges which it confers. It is certainly the theory of the law that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock therein has a right to believe that the corporation will, and to insist that it shall, be managed by the majority and in their interest, so far as such interest is lawful. If the majority of the electors of a municipality should agree, prior to an approaching election, to ballot among themselves to determine how all of them should vote, and that each of them would, at such election, vote as the majority should recommend, no one would undertake to maintain the validity or propriety

of the agreement, no matter what should be the consideration upon which it was based or the object of the parties at the time they entered into it. It would be vain to urge in its defense that the parties thereto constituted all the wise and virtuous members of the community, and that their only objects were the termination of pre-existing municipal evils and the promotion of hitherto unattempted municipal good. It would be a sufficient answer that the character of the elective franchise is such that every qualified voter must be permitted, at the moment of its exercise by him, to act as to him shall then seem proper, and irrespective of every previous pledge. Otherwise there may be government by minorities against the will of the majority.

If it be proper for the owners of five hundred and one shares of the stock of a corporation, consisting of one thousand shares, to agree to vote it as a unit, as may be determined by ballot, it must be equally proper for the holders of two hundred and fifty-one shares, constituting a part of this majority, to again agree that they will hold meetings, and by a majority of their shares determine how all their votes shall be cast in the meeting to be held to determine how five hundred and one shares shall be voted, and, if so, one hundred and twenty-six shares may thereby determine the whole policy of the corporation, though eight hundred and seventy-four shares remain opposed to it. Of course, under the decision in the principal case, each of these several agreements must be supported by some consideration in addition to the mutual promise of the parties thereto, but surely, for a result so advantageous, the parties most interested would not be unwilling to add other considerations.

SIEVERS v. SAN FRANCISCO.

[115 CALIFORNIA, 643.]

MUNICIPAL CORPORATIONS, STREETS, INJURIES FROM GRADING, WHEN NOT LIABLE FOR.—If a contract is let after legal proceedings for the grading of a street to the official grade, and an abortive attempt is made by the board of supervisors to change the grade, and, believing the grade to have been changed, the city engineer and surveyor furnishes a line of grade corresponding to the changed grade, and the street is graded accordingly, to the injury of a property owner, who would not have been injured had it been graded to the official grade, he cannot recover damages therefor of the municipality.

A MUNICIPALITY IS NOT LIABLE FOR A MISTAKE OF ITS ENGINEER and surveyor in furnishing incorrect lines of grade to a contractor by which he is misled and caused to grade a street to a greater height than the official grade, to the injury of an adjacent property owner.

MUNICIPAL CORPORATIONS—LIABILITY FOR ERRORS OF THEIR OFFICERS.—Where an injury results to a property owner from a wrong or omission of an officer of a municipality, charged with a duty prescribed and limited by law, he is not treated as a servant or agent of the corporation, and it is not liable for his error or omission.

MUNICIPAL CORPORATIONS, TORTS OF OFFICERS, NONLIABILITY FOR.—Where an officer of a corporation has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort, whereby a citizen is injured in person or property, the tort is the act of the officer only, and ordinarily, no recovery of damages can be had except against him.

Otto Tum Suden and F. W. Van Reynegom, for the appellant.

H. T. Creswell, city and county attorney, and Rhodes Borden, first assistant, for the respondent.

652 HENSHAW, J. Plaintiff brought his action to recover of the defendant damages for injury occasioned to his property by the grading of Van Ness avenue at the crossing of Chestnut street. The work as done dammed a well-defined channel through which surface water was wont to flow, and backed the water upon the land of plaintiff.

It was developed upon the trial that a contract had been let, after regular proceedings by the authorities, to grade Van Ness avenue to the "official grade" at a stipulated price per cubic yard of filling. The official grade was seventy-five feet above base. An attempt had been made by the supervisors to change the grade to eighty-three feet above base. This attempt, however, was admittedly abortive, as in *Warren v. Riddell*, 106 Cal. 352, and during all of the time the official grade remained established at seventy-five feet.

The city engineer and surveyor, whose duty it was to furnish grade lines and levels (Stats. 1891, p. 206), assumed eighty-three feet to be the official grade, and the contractor filled in accordingly. It is conceded that filling to the true grade would have occasioned plaintiff no damage, and that the injury which befell him was caused by the extra eight feet of superimposed earth. Plaintiff averred that the city caused and procured the crossing to be filled with soil, sand, and rock, to a height of eighty-three feet above base. Upon the showing above indicated he suffered a nonsuit, and appeals from the judgment.

653 His charge is, that the city procured the work to be done. Unless the proofs support this averment, the nonsuit was properly granted.

It does not appear that the supervisors, in any of their proceedings, called for any grading except "to the official grade and line." The bids were received under this call, and the contract ran in the same language. Precisely as in *Warren v. Riddell*, 106 Cal. 352, the contractors, through error induced by the city surveyor, or superintendent of streets, or by both, graded six or eight feet

above the line called for by the contract. The extra six or eight feet of filling, which alone it is admitted caused the injury, were not placed under any contract with, or directions from, the city. The case, then, differs radically from the many cited and relied upon by appellant, where the injury has resulted from work done for, and as directed by, the municipal authorities. Thus, in *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, the injury resulted from street filling done exactly in accordance with the contract. In *Conniff v. San Francisco*, 67 Cal. 45, Montgomery avenue was graded as the city directed. But the work dammed a natural watercourse, and the city was held responsible for the resulting injury to property. In *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, the city had diverted the waters flowing in a natural waterway into a sewer, and had negligently permitted the sewer to fall into a defective condition, whereby the escaping waters caused damage, for which the city was held liable. In *Eachus v. Los Angeles Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, the grading was properly done to the official grade, but, for resulting damages, defendant was held responsible. In *Tyler v. Tehama County*, 109 Cal. 618, a bridge was built as and where the supervisors directed. But it was constructed upon private property, for the injury to which the owner received compensation.

In all of these cases, the act or omission had the sanction, express or implied, of the municipal authorities. In the case at bar, the injury resulted from the act of ⁶⁵⁴ the contractor, neither contemplated nor called for by the supervisors.

It is apparent, therefore, that the injury did not arise from the act of an independent contractor in doing what his contract demanded. But appellant contends that the error of the surveyor and superintendent of streets in fixing the grade level was the mistake which misled the contractor and occasioned the injury; and that for this error of its servants and agents the city is responsible.

But the doctrine respondeat superior has found little favor in this state when it has been invoked against municipal corporations for dereliction or remissness of its agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers and prescribed and limited by express law. In the performance of its governmental or public functions, the corporation is either deemed a public agency, a mandatary of the state, as in *Barnett v. Contra Costa County*, 67 Cal. 77, and, therefore, not liable to be sued

civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action: *Lloyd v. Mayor of New York*, 5 N. Y. 369; 55 Am. Dec. 347. Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent of the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of, and controlled by, the law, and for his acts the municipality will not be held liable.

Thus, in *Crowell v. Sonoma County*, 25 Cal. 313, the county was held not responsible, in an action for injuries to property, for the negligent act of the road overseer in the performance of his duties, upon the ground that the relation between the road overseer and the county bore no resemblance to that of employer and employé. In *Winbigler v. Los Angeles*, 45 Cal. 36, the city was held not to be liable for the failure of the street superintendent to keep a bridge in repair, and *Crowell* ⁶⁵⁵ *v. Sonoma County*, 25 Cal. 313, was cited as authority. In *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, the negligence of the city marshal, who, under direction of the city council, was constructing a sewer, occasioned injury for which the city was sued. The rule was again announced that, in the absence of a statutory provision imposing the liability, a municipal corporation is not liable for injuries occasioned through the neglect of the officers of the corporation properly to perform their duties.

In some of these cases the complaint was for negligent omission, in others, for negligent commission, by the officers. In the first the damages claimed were for injury to property; in the others, for personal injuries; but the principle underlying them all is as above pointed out—that in its governmental functions the municipality is to be treated either as an independent sovereignty, not liable to be sued, or as an agent and mandatary of the state, upon which alone the responsibility rests.

There being no common-law liability upon a municipal corporation to keep highways in repair, for injuries which resulted to person or property by reason of their defective condition the municipality was not held responsible. Then, as pointed out in *Barnett v. Contra Costa County*, 67 Cal. 77, if the legislature enjoined it as a duty upon the municipality, it was considered a public, and not a corporate, duty, and, when any specific duty in this regard was imposed by statute upon any officer of the municipality, for his failure to perform it, he alone, and not the

city, is generally deemed responsible: *Huffman v. San Joaquin County*, 21 Cal. 427. In a learned and very instructive note to *Goddard v. Harpswell*, 30 Am. St. Rep. 373, Mr. Freeman, after careful and critical review and analysis of many authorities, deduces and expresses the rule of liability for the acts of an officer of the municipality in the following language: "When an officer of a municipality has no other authority than that intrusted to him by law, and he acts ⁶⁵⁶ beyond that authority, and commits a tort, whereby a citizen is injured either in person or property, the tort is the act of the officer only, and ordinarily no recovery of damages can be had, except against him."

Now, in the particular matter under consideration, the surveyor and the street superintendent drew none of their powers in the premises from the orders or directions of the board of supervisors. They derived them all from the express provisions of the statute. They were the servants of the law, not of the supervisors. Neither of these was vested with any discretion whatsoever in the performance of the particular duties enjoined upon them. It was the duty of the engineer to give the true grade, and no other. It was the duty of the superintendent to see that the street was filled to the official grade, and to no other. In the performance of these duties they were not subject to, nor controlled by, the supervisors of the city. If agents of the city at all in this regard, they were agents acting under limited and restricted authority fixed by statute: *Chambers v. Satterlee*, 40 Cal. 529. They could no more bind the city by instructing the contractor to grade above the line called for by the city than they could bind it by instructing the contractor to take his dirt for filling from plaintiff's private property. Having negligently performed a duty imposed upon them by express law, and not by order of the municipality, a duty in the performance of which they were vested with no discretion, so far as concerns the particular matter under consideration, the city cannot be held responsible for their dereliction.

There was no error of which plaintiff may justly complain in the admission of evidence. Plaintiff pleaded and proved that the official grade was in fact seventy-five feet. He also proved that the grading actually done was to eighty-three feet. He further showed the proceedings of the board of supervisors, all of which called for grading to the official grade, and none of which specified what that grade was in feet. ⁶⁵⁷ The evidence objected to and admitted upon cross-examination went to charge the surveyor with the commission of the error which caused the extra filling.

In the absence of such evidence, there would be nothing to connect the city with the matter. The evidence, then, tended to strengthen rather than to weaken plaintiff's case.

The judgment appealed from is affirmed.

McFarland, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

MUNICIPAL CORPORATIONS—WHEN NOT LIABLE FOR TORTS OF SERVANTS.—In the discharge of its purely governmental functions a municipal corporation, to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and the execution of such powers: *Love v. Atlanta*, 95 Ga. 129; 51 Am. St. Rep. 64, and note.

MUNICIPAL CORPORATIONS—LIABILITY FOR DAMAGE FROM GRADING STREET.—A city is not liable for consequential damages caused by the grading of its streets, unless the work is negligently performed: *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361, and note; *Selden v. Jacksonville*, 29 Am. St. Rep. 278, and note.

CASES
IN THE
SUPREME COURT
OF
FLORIDA

LAKE v. HANCOCK.

[88 FLORIDA, 53.]

A CONVEYANCE FROM A PERSON NOT SHOWN TO HAVE EVER BEEN IN POSSESSION of the property, or to have had at the time of the conveyance any title therein, does not tend to prove any title in the grantee.

VENDEE IN POSSESSION, ACQUISITION OF ADVERSE TITLE BY.—One who has contracted for the purchase of land, and gone into possession thereof under such contract, cannot dispute his vendor's title, nor set up an outstanding title as a defense to an action brought against him by his vendor to recover possession of the property.

AN UNRECORDED CONVEYANCE IS GOOD, except as against a person purchasing without notice thereof and for a valuable consideration.

UNRECORDED CONVEYANCE, BURDEN OF PROVING WANT OF NOTICE.—A purchaser of property need not prove his want of notice of a pre-existing unrecorded conveyance thereof except by proving the absence of such record.

NOTICE OF A PRE-EXISTING UNRECORDED CONVEYANCE MAY BE IMPUTED to a subsequent grantee from evidence of his admission that he knew his grantor did not own the land, and that the deed was of no account.

VALUABLE CONSIDERATION, BURDEN OF PROVING PAYMENT OF.—Where, after the execution of a conveyance, which is not recorded, the grantor conveys the same property to another, the latter must assume the burden of proving that he was a purchaser for a valuable consideration. Recitals in the conveyance of the payment of such consideration are not evidence thereof.

A JUDGMENT CONCLUDES THE PARTIES ONLY as to the ground covered thereby and the facts necessary to uphold it.

A JUDGMENT IN EJECTMENT in an action for a tract of land, including that sued for in a second action between the same parties, the plaintiff having recovered judgment in the former action, but not for the tract of land embraced in the second, is not conclusive against him in such second action. It merely shows that,

for some reason not disclosed, the land embraced in the second action was omitted from the former judgment.

JURY TRIAL, HARMLESS ERROR IN INSTRUCTIONS.—An instruction stating the law too strongly as against the defendant does not entitle him to a reversal, if, under no proper instruction, judgment could have been given in his favor.

Action by Lake against Hancock for the recovery of real property. The defendant acquired possession of such property as a tenant of George W. Hancock, and remained in possession of such property for some years after the death of Hancock as tenant of the plaintiff, who was Hancock's widow and heir at law. In the fall of the year 1883, the defendant agreed to purchase the land, and received a bond to give him title upon the payment of the purchase price. He paid some cash and executed promissory notes for the balance. Several years afterward he informed plaintiff that he was not able to pay for the land, and that he had a deed thereof from George W. Watts and wife, but that he knew that Watts did not own the land, and that the deed was of no account. The plaintiff tendered a conveyance of the property, and at the same time demanded the payment of the balance of the purchase price. It was not paid. The defendant subsequently announced his intention of holding the land, hence the present suit. The defendant relied upon a former adjudication, the nature of which is disclosed in the opinion of the court. The deed which the defendant received from George W. Watts and wife was made and recorded in September, 1886. She was a daughter and heir at law of the original patentee of the land. She had, in 1882, conveyed the same to George W. Watts, but the conveyance was not recorded until September 1, 1890. Judgment for the plaintiff, the defendant appealed.

B. B. Blackwell, for the appellant.

B. H. Palmer, for the appellee.

57 LIDDON, J. It is claimed by counsel for appellant (defendant below) that the motion for new trial was improperly overruled, for the reason that the evidence fails to show the entire estate in the appellee, and would not support a recovery of a fee simple title. The defect in the evidence is not pointed out by counsel. He says it is a plain palpable fact to be ascertained by an inspection of the deeds in evidence. We have examined the deeds offered by plaintiff, and, in connection with the parol proof offered, we think, as against the defendant, they show a valid fee simple title in the plaintiff. It is entirely useless, when

the propositions of law hereinafter stated shall be considered, to state the nature and character of the evidence impelling us to this conclusion. The defendant evidently means that the deed of George W. Watts and wife to him shows that at the time of his contract of purchase of the land there was an outstanding title to the land, or some interest therein, which was afterward purchased by him, and constitutes a defect in appellee's title. There are many reasons why this deed does not ⁵⁸ show any title whatever in the appellant, and why it fails to show any defect in appellee's title. In the first place, there is no evidence whatever that George W. Watts and wife, the grantors, were ever in possession of the premises conveyed, or that at the time of such conveyance he had any title to the same. A deed unaccompanied by such evidence is not sufficient evidence of a title of appellant to justify setting aside the verdict upon the grounds stated: *Florida Southern Ry. Co. v. Burt*, 36 Fla. 497. Especially should this deed be held of no avail to the appellant when, according to the undisputed evidence in the case, he admitted to the appellee in the presence of her counsel, that he knew at the time of the execution of the deed that Watts did not own the land, and that the deed was of "no account." Another, and the most important, reason why the appellant cannot avail himself of the purchase of the supposed outstanding title is, that at the time he acquired such title he was in possession of the land—a possession acquired from the appellee under an executory contract with her for the purchase of the same. Having failed to pay for the land in accordance with his contract, and to surrender the possession upon demand after he had forfeited his right thereto, he is estopped to dispute his vendor's title or to set up any outstanding title acquired by him while in such possession (as is stated above), when his vendor sues for the possession of the land thus wrongfully withheld from her. The following rule has been laid down by this court: "A party having the right to enter into possession of land, and agreeing to so enter in a contract of purchase based upon an acknowledgment of title in another, and obtaining possession so far as this party is concerned under ⁵⁹ such agreement, is estopped from referring his possession to rights acquired under a conveyance by a third party to him. A party thus entitled to possession, or thus in possession, acquiring an outstanding title, holds it in trust, and not for his own benefit": *Sanford v. Cloud*, 17 Fla. 557. In *Bush v. Adams*, 22 Fla. 177, it was held that "if a vendee of land, remaining in possession, buys in an outstanding encumbrance, he will not be permitted to set up an

adverse title under it." This case points out the remedy of the vendee, which it is useless to discuss here. The same rule is also settled in the case of *Goodwin v. Markwell*, decided at the last term of this court, in which *Hart v. Bostwick*, 14 Fla. 162, is cited. While it is perhaps useless to cite other authorities, it may be stated that they are in full accord with the decisions of this court. A leading work upon the subject correctly states the law as follows: "Where, however, the vendee enters into possession under an executory contract to purchase land, and fails to comply with the terms of the contract by neglecting to pay the purchase money, the vendor may bring ejectment, and the vendee obviously cannot dispute his title, nor set up an outstanding title to defeat a recovery, any more than a lessee could question the title of his lessor, and for the same reason. The estoppel in one case, as in the other, is founded upon the fact that the defendant has been clothed with the possession by the plaintiff. Were the rule otherwise, the inconvenient condition of affairs would result that no vendor could safely part with the possession of his lands until the consideration money had been fully paid": *Sedgwick and Wait on Trial of Title to Land*, 2d ed, sec. 817. Many authorities are cited by the author, a number of which ^{we} we have examined, and which fully sustain the propositions announced.

There is no virtue in any claim by appellant that his deed from Watts and wife has priority over the deed from the same parties to appellee's ancestor, by reason of priority of record. The unrecorded deed was good and effectual against the appellant, unless when he purchased he did so: 1. Without notice; and 2. For a valuable consideration: *McClellan's Digest*, sec. 6, p. 215; *Rev. Stats.*, sec. 1972. There was no proof whatever upon either of these points upon the part of the appellant. He relied exclusively upon the bare fact of the execution of a deed to him. As to the first point—want of notice—the weight of authority is that this need not be shown by a purchaser otherwise than by proof of the absence of a record, which is *prima facie* sufficient: *Shotwell v. Harrison*, 22 Mich. 410. We think, however, this *prima facie* proof of want of notice was overcome by proof showing actual notice to the appellant of the former conveyance. The testimony upon which we predicate this view is the undisputed evidence of the admissions of appellant to appellee as to his knowledge of the title of his grantors, hereinbefore mentioned.

Upon the other point—payment of a valuable consideration—there is considerable conflict among the authorities as to the burden of proof. Some of the authorities hold that in actions of

ejectment, where the strict legal title only is in question, the recital of a receipt of a consideration in a deed is prima facie evidence of its payment. As we do not adhere to this line of decisions, nothing more need be said of them. We simply refer those desiring further information to the case of *Wood v. Chapin*, 13 N. Y. 509, 67 ⁶¹ Am. Dec. 62, and note on pages 74 and 75, where other cases announcing similar views are collated. The great weight of authority is in favor of the proposition that where the payment of a valuable consideration becomes a material question, it must be affirmatively proven by the party relying upon it, and such payment cannot be proven by the mere recital of it in the deed. In *Shotwell v. Harrison*, 22 Mich. 410, it is, we think, correctly said: The burden of proof is upon the party who claims by virtue of a priority of record against a prior but unrecorded deed to show affirmatively the payment of a valuable consideration, and that by some other evidence than the mere recital of it in the deed. This case contains an elaborate and interesting discussion of the subject, giving the reason of the rule, too lengthy to be here inserted. Among other authorities to the same effect are *Long v. Dollarhide*, 24 Cal. 218; *Galland v. Jackman*, 26 Cal. 79; 85 Am. Dec. 172; *Nolen v. Gwyn*, 16 Ala. 725; *Watkins v. Edwards*, 23 Tex. 443; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Hawley v. Bullock*, 29 Tex. 216; *Bolton v. Johns*, 5 Pa. St. 145; 47 Am. Dec. 404, and authorities cited in note on page 408; *Union Canal Co. v. Young*, 1 Whart. 410; 30 Am. Dec. 212, and authorities collated in note on page 225; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137. In 2 Devlin on Deeds, section 821, after reviewing the authorities, proceeds as follows to state the true rule and the principle underlying the same: "The cases holding that a recital in a deed of the payment of the consideration is not evidence of that fact as against a stranger, state, as it seems to us, the true and correct principle. If the payment of the consideration price is a fact essential to ⁶² the establishment of a right or claim, this fact should be proven as are other facts. The acknowledgment of payment is an admission on the part of the grantor, contained in writing it is true, but of no greater force for this reason, except for its certainty, than if made orally.

The appellant claims that the judgment was erroneous because the evidence upon the trial shows that the title and right of possession to the land in controversy was *res judicata* between the parties. The proper disposition of this contention requires some statement of the evidence referred to. The evidence upon this

point consisted of the record of the trial in an action of ejectment, wherein the present plaintiff was the plaintiff, and the present defendant was the defendant. The verdict, in the usual form, finds for plaintiff, and complies with the statutory requirements as to stating the quantity of estate of the plaintiff, and giving a description of the lands. The judgment properly follows the verdict. The lands described in such verdict and judgment are not the same as those sued for; they are entirely different. John Vinzant, clerk of the circuit court, testified that he had searched carefully in his office for the pleadings in the case in which the judgment was entered, but was unable to find them, although they had been in his office. B. B. Blackwell, defendant's attorney, testified that he was familiar with such pleadings, and that the eighty acres of land sued for was embraced in the declaration in the former case, together with other land, but the plaintiff failed to recover said eighty acres; that the plaintiff in the former case relied upon the same evidence as in the present, except a deed from Holmes Parks and wife, which had not been executed ⁶³ at such time. This evidence does not sustain defendant's contention. It only tends to show that this land was included in a declaration in a suit in ejectment between the said parties, but for some reason not shown was omitted from the verdict and judgment. The issue as to this land seems not to have been determined for either party. There being no judgment as to the identical matter in controversy, the former proceedings are no bar to plaintiff's recovery. To constitute such a bar to further proceedings, there must have been actual judgment upon the same issue. It is the policy of the law "that there should be an end to every litigation, and when an issue has been once actually determined, it should not again be contested by the same adversaries, or those claiming under them. . . . The general rule is intended to prevent litigation, and preserve peace. . . . But without such actual determination on the merits, evidenced by a record which cannot be contradicted, the reason of the rule does not apply": *Webb v. Buckelew*, 82 N. Y. 555. The judgment is not a bar to further proceedings, unless it be between the same parties and touching the same subject matter: *Little v. Barlow*, 37 Fla. 232; 53 Am. St. Rep. 249; *Holt v. Miers*, 9 Car. & P. 191. It is a familiar principle that a judgment concludes the parties only as to the grounds covered by it and the facts necessary to uphold it: *Wells on Res Adjudicata*, 196, and authorities cited in text; 21 Am. & Eng. Ency. of Law, 128, and authorities cited in note: *Packett Co. v. Sickles*, 5 Wall. 580, text 592.

One of the charges of the court to the jury, it is complained, states too broadly the nature of the title which must be had by the defendant in order to overcome ⁶⁴ the proof of a legal title and right of possession. In view of the fact that defendant had, as against the plaintiff, no title or right of possession whatever, and that he was estopped to dispute the plaintiff's title, and that he could have defeated plaintiff under no proper instruction or view of the law and facts of the case, and that plaintiff was entitled to succeed, whatever might have been the charge of the court, it would be idle to discuss the question of technical error in this charge. If it was erroneous, it was harmless error, for which the judgment should not be reversed: *Hayes v. Todd*, 34 Fla. 233, text 243; and cases cited from this and other states; *White v. Ross*, 35 Fla. 377; *Robinson v. Hyer*, 35 Fla. 544; *Herman v. Williams*, 36 Fla. 136; *Bacon v. Green*, 36 Fla. 325.

Another charge of the court upon the subject of *res judicata* is objected to. There is no proof of any adjudication between the parties of the subject matter of the controversy. Therefore, the court did not mislead the jury, to the prejudice of appellant by any instruction upon his defense of *res judicata*. According to the authorities just above cited, any error upon such subject was necessarily harmless.

There is no reversible error in the record. The judgment of the court below is affirmed.

DEEDS—NECESSITY FOR REGISTRATION.—The object of recording a deed is to give notice to creditors and subsequent purchasers from the grantor of the grantee's title, and, except as to the matter of notice, an unrecorded title is as good as if recorded: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71. Unrecorded conveyances are valid against all persons except subsequent purchasers and mortgagees in good faith for a valuable consideration: *Warrock v. Harlow*, 96 Cal. 298; 81 Am. St. Rep. 209, and note. See, also, the note to *Hockenull v. Oliver*. 12 Am. St. Rep. 238.

NOTICE OF UNRECORDED CONVEYANCE—BURDEN OF PROOF.—This subject is fully discussed in the extended note to *Anthony v. Wheeler*, 17 Am. St. Rep. 289.

DEEDS—CONSIDERATION.—A RECITAL in a deed that the consideration has been paid is not conclusive: *Byers v. Locke*, 93 Cal. 493; 27 Am. St. Rep. 212, and note with the cases collected; but see *Babcock v. Collins*, 60 Minn. 73; 51 Am. St. Rep. 503.

JUDGMENTS—CONCLUSIVENESS OF, GENERALLY.—A judgment of a court of competent jurisdiction is conclusive as against parties and privies on all questions adjudicated by it: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note with the cases collected.

MILLER v. MILLER.

[33 FLORIDA, 227.]

CHILDREN, CUSTODY OF.—A court may refuse to award the custody of a child to either parent, and place it in the control of a third person in a proper case.

PARENTS' RIGHT TO CUSTODY OF CHILDREN.—Neither parent has any absolute right to the custody of their child. The court may, when its interests so demand, leave it where its interests will be best promoted. Hence, though by the common law the father's right to the custody of legitimate children is paramount to that of the mother, the child may, nevertheless, be awarded to her, where, from its age, sex, or any other cause, its welfare will probably be best advanced by leaving it in her care.

PARENTS' MISCONDUCT—CUSTODY OF CHILDREN.—If, as between the two parents, one has, by evil habits or improper conduct, become an unfit custodian of their child, its custody should be awarded to the other.

A PARENT SHOULD NOT BE DEPRIVED OF THE CUSTODY OF HIS CHILD by awarding its control to a third person where the character of the parent is not assailed. If the court deems that the custody ought not to be awarded to the mother, then it must be given to the father in preference to any third person, where the father is without fault, and is not shown to be unfit to have the care and custody of his child.

Robbins & Graham, for the plaintiff in error.

John E. Hartridge, for the defendant in error.

228 MABRY, C. J. Defendant in error sued out a writ of habeas corpus in April, 1896, for the custody of her minor child, a daughter. She alleges in her petition that her husband, Frank W. Miller, had, on the 14th of February previous, driven her from her home without just cause; that she took with her the child, between two and three years old, and on the 7th of April, 1896, the father forcibly took it from her; that it needed her care and nurture, and she believed the father would send it to some place to estrange its affections from her. Plaintiff in error produced the child and made return denying the allegations in the petition, and alleged that his wife had deserted him. He denied that he had forcibly taken the child, and claimed to be entitled to it as its father. On the hearing by the **229** circuit judge, the child was committed to the custody of Mrs. Laura B. Brelsford, its maternal aunt, until further ordered, and that both father and mother be allowed to visit it and be treated with proper respect. The husband sued out a writ of error.

The parties were married in January, 1892, and lived together until February 21, 1896, when the wife left their home and took with her the child, then nearing its third birthday. The

wife stopped at a neighbor's for a short time, and then went to another house where her husband had secured board for her, and remained there five weeks. During this time the child was sent every day to the father's office to be seen by him. The husband ceased to pay board at the end of the five weeks, and the wife removed to another house. After this removal she declined to send the child to the office any more, in consequence, as she states, of its being sick, attributable by her to overeating while with the father. She states, however, that she informed her husband that he could see the child at her boarding-house. A short time thereafter the child was permitted to go from the boarding-house to town, and while there the father picked it up in his arms and started to his boarding-house, and then and there was a struggle between the parents for the child. The father retained it, and had it cared for by a lady who had become attached to it before the separation.

The marriage state, voluntarily entered into, imposes duties and obligations that cannot be disregarded without serious injury, not only to the parties, but to society. Husband and wife separated and estranged occupy doubtful positions hurtful to themselves, and still more injurious to their children. No such attitude ²³⁰ should be assumed by a married person unless unavoidable, and for just cause. A separation without sufficient cause would be violative not only of the marital duties and obligations, but a wrong to offspring and to society. Among the many evils resulting from the destruction of the marital relationship is the oft painful contention of the parents for the custody of their children, and there is no other contention within the range of legal investigation from the determination of which a court would more willingly be relieved. Husband and wife, having reached in their domestic discord that state of mind and feeling when they cannot agree, impose upon the court the oftentimes painful duty of deciding who shall have the custody of a child. In the present case, the court did not award the custody to either parent, but placed the child in the care and control of a third party. It may be conceded that the court has such power and may exercise it upon a sufficient state of facts. In speaking of the right of parents to the custody of children, we said in *Marshall v. Reams*, 32 Fla. 499, 37 Am. St. Rep. 118, that it was not absolute and beyond the control of other circumstances that may surround the case, and that the court was not bound to deliver the child to the claimant, but may, where its interests demand it, leave it where its welfare will be best promoted; that it

is the benefit and welfare of the child to which the attention of the court ought principally to be directed, and by which it should be guided, whether the contention be between father and mother, or between them and a third person, or between strangers. The ties of nature and of association, the character of the applicant for the child, its age, health, and sex, the moral or immoral ²³¹ surroundings of its life, the benefits of education and development and pecuniary prospects, as well as many other considerations, enter into the judicial determination. This is the correct rule in a strictly habeas corpus proceeding for the custody of a child. The original office of the writ was to release from illegal restraint, but in case of children of such tender years as to be incapable of exercising a liberty of choice, and where the custody belonged of right to parents, the court not only released from the illegal control, but awarded the proper custody. As between father and mother, the right of the former at the common law, in case of legitimate children, was paramount: *State v. Reuff*, 29 W. Va. 751; 6 Am. St. Rep. 676. Church on Habeas Corpus states the rule as follows: "In conflicting claims between parents for the custody of their legitimate children, the right of the father was held paramount to that of the mother; but the first and cardinal rule by which the courts were governed in awarding the custody was the welfare of the child, and not the technical legal right. The courts were not quite so free to exercise their discretion in the father's favor, by giving him the custody of his child, when the child was not in the father's custody; but if he already had the custody, it would not take it from him, unless he was guilty of neglect or abuse, or his conduct was such that there was probability of moral contamination": Church on Habeas Corpus, sec. 426. Guided by the consideration of the child's welfare when of tender years, the courts often exercise the discretion, in cases of parental conflict, of awarding the custody to the mother, when both father and mother are suitable persons to have possession. This would naturally be the case ²³² when the child is within the age of nurture and most needs the care of a mother. The same consideration however, would prompt a court to free a child even of tender years from evil influences resulting from parental misconduct when of such a nature as to injuriously affect the life and character of the child. Without such conduct and unfitness on the part of both parents, the court should not take the custody from both. If they are both suitable, the child's welfare, considering its tender age, sex, and health, may demand that it be given to the mother, but, in the absence of such con-

siderations, the father has the paramount right. If one of the parents has become unfit by evil habits or improper conduct, and no such charges can be sustained against the other, the custody should be awarded to such one. We conclude from the order made that the circuit judge was not willing, on the proofs before him, to award to the mother the custody of the child, though it was of tender age and a girl. From the revelations of the abstract, the conclusion is irresistible that the wife was without sufficient excuse in leaving her husband's home, and thereby breaking up the family ties. More than this, we think the testimony shows such conduct on her part as to fully justify the court in refusing to award the custody of her child to her. The husband has complained of the order made, and not the wife, and we are unable, after a careful examination of the evidence, to sustain the order depriving the father of the custody of his child. Parents have the legal right to the custody of their children of tender age, and, in the present case, the court having refused to give the child to the mother, the father's right should not have been denied, unless good grounds for it were shown. It is ²³³ not shown that the husband struck his wife or drove her from his home, nor is he shown to be unfit to have the custody and care of his child. His character is not assailed, and there is no element of contamination or moral detriment to the child in leaving it with its father, and we discover no sufficient ground for depriving him of the legal right, secured to him by the law, to its custody. The court should, in our judgment, have left the child with its father, and secured to the mother the right to visit and see it.

No question was raised as to the correctness of the abstract filed, and we have considered the case, as provided by the rule, on the abstract alone.

The judgment will be reversed.

PARENT AND CHILD—CUSTODY.—On a proceeding by a father to obtain the custody of his infant from its grandparents, to whom he had intrusted it, the court will not grant it if it seems to be against the interests of the child: *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545, and note; *Sturtevant v. State*, 15 Neb. 459; 48 Am. Rep. 349, and note. To the same effect see *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843, and note. See, also, the extended note to *State v. Smith*, 20 Am. Dec. 830.

PARENT AND CHILD—CUSTODY—MISCONDUCT OF PARENT.—The fact that the mother of a child is a passionate, coarse, vulgar, and pugnacious woman, and that the father is addicted to the excessive use of intoxicants and has other debasing habits, is not sufficient to deprive them of the custody of the child: *Lovell v. House of the Good Shepherd*, 9 Wash. 419; 43 Am. St. Rep. 839, and note.

COOGLER v. RHODES.

[38 FLORIDA, 240.]

EVIDENCE.—A LEADING QUESTION IS ONE WHICH SUGGESTS or puts a desired answer in the mouth of a witness. A question is not necessarily leading because it may be answered by "yes" or "no."

EVIDENCE—LEADING QUESTION.—An interrogatory, in writing, addressed to a witness asking him whether or not he knew that A ran a house of prostitution in a town designated, and, if "yes," when and for how long a time, is not objectionable as a leading question.

EVIDENCE IN AN ACTION FOR LIBEL, WHEN MATERIAL.—If, in an action for libel in charging the plaintiff with keeping a house of prostitution, a witness for the defense, in response to an inquiry as to whether he knew of plaintiff's keeping such a house, and if so, when, and for how long, answers that he does not know positively, but that it was generally supposed that the plaintiff was concerned in the management of such a house, this answer is admissible as tending to show good ground for suspicion of the truth of the matters charged, and therefore tends to mitigate damages, and to aid the jury in determining whether the alleged libelous language was published through express malice of the defendant or not.

EVIDENCE—LIBEL.—Where the libel charged by the plaintiff was the accusing him of keeping a house of prostitution, bonds given by him as a surety on behalf of public prostitutes for their appearance in proceedings against them for the keeping of a disorderly house should be received in evidence, at least for the purpose of mitigating damages.

LIBEL.—PRIVILEGED COMMUNICATIONS ARE DIVIDED INTO TWO CLASSES, absolutely privileged and conditionally or qualifiedly privileged.

LIBEL.—A PUBLICATION IS CONDITIONALLY OR QUALIFIEDLY PRIVILEGED where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to a certain other person to whom he makes such communication in bona fide performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he bona fide and without malice proceeds to tell.

LIBEL—CONDITIONALLY PRIVILEGED PUBLICATION —BURDEN OF PROOF RESPECTING MALICE.—If a publication is qualifiedly privileged, malice cannot be presumed from the mere use of libelous language, and the plaintiff, in an action to recover for such libel, must affirmatively show malice in the publisher. Such malice may be inferred from the language itself, or proved by extrinsic circumstances, but is not inferable from the mere fact that the statements are untrue.

LIBEL—MALICE.—That which would otherwise be a qualifiedly privileged publication is not so if the publisher was actuated by malice.

LIBEL — QUALIFIEDLY PRIVILEGED COMMUNICATION.—Communications to the appointing power with reference to the character and qualifications of a candidate for appointment to a public office are qualifiedly or conditionally privileged. No action will lie therefor unless they are both false and malicious; and the burden of showing them so is upon the plaintiff.

LIBEL—PUBLIC OFFICE, CANDIDATE FOR.—If a person is a candidate for appointment to a public office at the hands of the governor, one who writes to him that it is a notorious fact that the candidate runs the only house of prostitution in the town, and his mistress has been indicted in the courts, is not subject to an action for libel, unless his statements were both false and malicious. The publication is qualifiedly privileged. Though the matter published was not true, yet if there was reasonable ground to believe it true, and it was published in good faith, for the public good, without any private personal malice, the publisher is not liable to damages therefor.

Angus Patterson, for the plaintiff in error.

Carter & Wall, for the defendant in error.

242 LIDDON, J. During the month of May, 1890, there was a vacancy in the office of sheriff of Hernando county. The Honorable Francis P. Fleming, then governor of the state of Florida, had appointed the defendant in error to fill said vacancy, but the commission upon such appointment had not been issued and delivered. The plaintiff in error, being a citizen and elector of this state, resident in said county, and opposed in sentiment to the issuing of such commission, sent a letter to the governor upon the subject. The plaintiff in error, hereinafter called the defendant, in such letter used the following language of the defendant in error, hereinafter called the plaintiff, viz: "It is a notorious fact that for years he has run the only house of prostitution here, and his mistress has been indicted in our courts." The plaintiff, by his amended declaration, brought his action for libel against the defendant on account of the words above quoted, alleging that they were falsely and maliciously written and **243** published of the plaintiff. No special damage was alleged in the declaration. The defendant filed six pleas. The second, third, and fourth were stricken out upon motion. Issue was joined and trial had upon the first, fifth, and sixth pleas. The first plea was, not guilty. The fifth, in substance, admitted the publishing of the alleged libelous language, but stated that it was written without malice toward the plaintiff and was a privileged communication upon which the action could not be maintained. The sixth plea admitted publishing the alleged libelous language, but plead justification, in that the same was published without malice to the plaintiff, with good motives, and the same was wholly true.

No question of the inconsistency of these pleas with each other was raised in the court below, or in this court. Therefore, in this opinion, in considering questions of admissibility of evidence, we have considered the same with reference to all or either of the pleas upon which issue was joined and trial had.

The errors assigned and argued involve the correctness of the ruling of the court in excluding certain evidence offered by the defendant, and the general question whether the communication containing the alleged libelous matter was not a privileged publication for which no action would lie. One of the rulings excluding testimony complained of was in relation to the depositions of one W. D. Sims, a witness for defendant, taken upon commission in the state of Alabama. The following written interrogatory was addressed to this witness: "Interrogatory 4. State whether or not you know that said Napoleon B. Rhodes ran a house of prostitution in the town of Brooksville, Hernando county, state of Florida; and if yes, when and for ²⁴⁴ how long a time?" The answer was to the effect that the witness did not know positively as to the matter inquired about, but that it was generally supposed that the plaintiff was concerned in the management of such house of prostitution. The objection upon which the question was excluded was, that it was leading. In what respect it was claimed to be leading is not specified. Among other definitions, a leading question has been defined as one which may be answered yes or no. This, however, is not the most usual definition, or the one most exactly fixing the meaning of the term. The proper signification of the expression is a suggestive question, one which suggests or puts the desired answer into the mouth of the witness. It has also been said that a question which assumes the existence of material facts which have not been proven is leading: 1 Thompson on Trials, sec. 358, and authorities cited in notes to the text; Rapalje and Lawrence's Law Dictionary, tit. Leading Question; Anderson's Law Dictionary, tit. Question, subtit. Leading Question; People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; 1 Greenleaf on Evidence, sec. 434. We agree with the supreme court of Michigan that a question is not necessarily objectionable as leading because it can be answered "yes" or "no," and that a leading question is one that points out the desired answer, and not merely one that calls for a simple affirmative or negative: McKeown v. Harvey, 40 Mich. 226. The case of Harvey v. Osborn, 55 Ind. 535, is also to similar effect as the Michigan case. Tested by the above definitions, the question excluded was not a leading question. The whole inquiry is not one which could be answered by a simple "yes" or "no." Neither does it suggest to the witness or put the desired answer ²⁴⁵ in his mouth, making the witness a mere echo of the matters asserted by the counsel conducting the examination. While it is perhaps not in as good shape as should have been, and if it had been

propounded upon an oral examination in open court, instead of being prepared in writing for the taking of depositions, upon suggestion of the court, might have been made more correct and formal, yet we do not think it assumes any fact to have been proven in the case. The whole interrogatory merely asks the witness if he has any knowledge as to a fact which is in issue between the parties, and directs him if he has such knowledge to state the extent of the same. Questions very similar in form were upheld as not being leading in *Harvey v. Osborn*, 55 Ind. 535. A question which merely directs the attention of the witness to the fact in controversy is not leading: 1 *Thompson on Trials*, sec. 360. The great primary object in the examination of witnesses is to make known the truth of the matters in controversy. Great nicety upon the subject of leading questions is not conducive to this object or to convenience in examination, or to the administration of justice: *McKeown v. Harvey*, 40 Mich. 226. As the witness did not know anything of his own knowledge, but only spoke from hearsay or general reputation, it is claimed by plaintiff that the evidence was wholly immaterial, and that the error, if any, in its exclusion was harmless. The evidence excluded tended to show good ground for suspicion of the truth of the matters alleged to be false (*Rigden v. Wolcott*, 6 Gill & J. 413, text 418), and therefore was clearly material to the issues joined in the case. It was material, under the plea of not guilty, not to prove the truth of the charge, but as tending to show a less degree of malice²⁴⁶ and mitigating the damages to which plaintiff was entitled: *Jones v. Townsend*, 21 Fla. 431; 58 Am. Rep. 676. The evidence was also admissible under the plea of privileged communication, as a circumstance to be considered by the jury as to whether the alleged libelous language was published through the express malice of the defendant: *Montgomery v. Knox*, 23 Fla. 595.

The defendant offered in evidence several appearance bonds or recognizances executed by the plaintiff as a surety for one Minnie Cameron, charged with keeping a disorderly house, and for one Millie Lawrence, Edna Gray, and Ethel Sexton, respectively, charged with lewdness. It appears from the undisputed evidence in the case that these four women were public prostitutes. Minnie Cameron, the first named, was the proprietress of a house of ill-fame, and the others were regular inmates thereof. There was also much evidence tending to prove general suspicion that Minnie Cameron was a kept mistress of the plaintiff, and that he visited the house and had business dealings with said Minnie Cameron. The court admitted the bond of Minnie Cameron, but excluded

those of the other women. This ruling was erroneous in excluding some of these bonds. Admitting that this evidence did not tend to show that the plaintiff actually "ran" or managed a house of prostitution, yet the fact that he was on such terms with its proprietress and its inmates as to be willing to risk large pecuniary liability (as shown by the bonds) for their benefit, was a fact which at least should have been submitted to the jury in connection with the other evidence in the case for the purpose of mitigating the damages for the reasons hereinbefore stated in reference ²⁴⁷ to the error in excluding the interrogatory addressed to the witness W. D. Sims. It is claimed by plaintiff that the error in excluding this testimony was harmless, for the reason that the plaintiff, upon cross-examination, himself admitted that he had signed some bonds for these parties. The record, however, shows that the admission was very indefinite. The plaintiff did not seem to recollect with what offense the parties were charged, nor whether the instruments were appeal or appearance bonds; neither did he state the amount thereof. From the exclusion of the bonds themselves when offered in evidence the jury evidently got the idea that the fact of signing these bonds by the plaintiff was a matter of no consequence in the case. As the evidence would have been valuable to the defendant in mitigation of damages, and as the jury rendered a verdict for the large amount of five thousand dollars, under the circumstances of the case we cannot say that the amount of the verdict would not have been affected by the evidence if the jury had been permitted to hear it. Therefore, the error does not appear to have been a harmless one.

The last and most important question in the case arises upon the assumption of the defendant that the letter containing the alleged libelous words was a privileged communication, and that no action would lie upon the same. It is deemed proper to observe here, in speaking of a publication the nature of which exempts the publisher from an action of libel for matters therein stated, the better term is a privileged publication, instead of a privileged communication. Though these terms are often used interchangeably and as synonymous, the term "privileged communication" in its ordinary signification has reference to that ²⁴⁸ class of written messages which either entitles or obliges the party to whom they are communicated to withhold the disclosure of matters thereof: Townshend on Slander and Libel, 4th ed., sec. 208. The term "privileged publication" is the one which has been used by this court: *Montgomery v. Knox*, 23 Fla. 595, text 604. Privileged publications are divided into two classes:

absolutely privileged, and conditionally or qualifiedly privileged: Townshend on Slander and Libel, 4th ed., sec. 209. The term "absolute privilege" has reference to words spoken or written in certain legislative and judicial proceedings. As we do not consider the publication in question as falling under this class of privilege, we will not attempt definitions of the same. Various definitions, with differing and refined shades of meaning, have been given of what constitutes a conditionally privileged publication. Some of them will be found in the following authorities: Townshend on Slander and Libel, 4th ed., sec. 209; Odgers on Libel and Slander, 196 et seq.; Cook v. Hill, 3 Sand. 341. That general definition which more nearly fits the circumstances of the present case is as follows: "Where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to a certain other person, to whom he makes such communication in the bona fide performance of such duty": Odgers on Libel and Slander, 198. Perhaps the following is more especially applicable: "Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is a privileged communication." This definition is considered more ²⁴⁹ exact in leaving out the word "duty," because it is privileged in the interests of society for a man to bona fide and without malice say those things which no positive legal duty may make it obligatory upon him to say: Townshend on Slander and Libel, 4th ed., sec. 209. That the matter stated in accordance with above definitions with good motives, and upon reasons apparently good, should turn out to be untrue will not render the publisher liable: State v. Burnham, 9 N. H. 34; 31 Am. Dec. 217; Moore v. Butler, 48 N. H. 161; Toogood v. Spyring, 1 Crompt., Mees. & R. 181; 4 Tyrw. 582. In cases of qualifiedly privileged publications, the presumption which attends cases not so privileged of malice from the publication of libelous language does not prevail; the burden of proof is changed, and, in order for the plaintiff to recover, he is called upon affirmatively and expressly to show malice in the publisher. This malice may be inferred from the language itself, or may be proven by extrinsic circumstances. While the malice may be inferred from the communication, it is not inferable from the mere fact that the statements are untrue. The existence or nonexistence of such malice, where the facts are controverted and there is evidence upon the subject, is a question of fact for a jury: Townshend on Slander and Libel, 4th ed., sec. 288, and

authorities cited in notes to the text; *Pattison v. Jones*, 8 Barn. & Co. 578; *White v. Nicholls*, 3 How. 266, text 285 et seq. That which would otherwise be a qualifiedly privileged publication is not so if the publisher is actuated by malice: *White v. Nicholls*, 3 How. 291; *Montgomery v. Knox*, 23 Fla. 595, text 609. This latter case does not draw any distinction between the two classes of privileged ²⁵⁰ publications. It states, in effect (ninth head-note, and also in the text), that a publication in regard to business by one having an interest therein, and only to others having an interest, is privileged, and the privilege furnishes a good defense in a suit for libel, unless it can be shown that the publication was made from express malice; in which case the privilege does not avail. This decision is of undoubted correctness in its application to the facts of the case adjudicated. The general proposition of law, however, would have been more clearly expressed if the court had used the words "qualifiedly" or "conditionally," in connection with the word "privileged," because it seems that the question of malice does not enter into cases of absolute privilege: *Cooley on Torts*, 2d ed., top p. 247 et seq. In cases of absolute privilege, an action cannot be sustained even where there is express malice.

Communications to the appointing power with reference to the character and qualifications of candidates for public office have been often given as illustrations of qualifiedly or conditionally privileged publications: *White v. Nicholls*, 3 How. 266; *Cook v. Hill*, 3 Sand. 341; *Commonwealth v. Wardwell*, 136 Mass. 164; *Cooley on Torts*, 2d ed., top p. 251. In such cases, no action will lie for false statements in the publication, unless it be shown that they are both false and malicious, and the burden of proof in this respect rests upon the plaintiff: *Cooley on Torts*, 251, and authorities in note 3; *Wieman v. Mabee*, 45 Mich. 484; 40 Am. Rep. 477; *O'Donaghue v. McGovern*, 23 Wend. 26.

Applying the law to the facts of this case, the letter of the defendant, an elector of this state resident in Hernando county, to the governor of the state, in reference to the character and qualifications of the ²⁵¹ plaintiff, who was an applicant to said governor to be appointed sheriff of said county, was not an absolutely privileged, but was a qualifiedly or conditionally privileged publication. The defendant could not, under the guise of such a communication, falsely and maliciously traduce and slander the moral character of the plaintiff, and, if he does so, makes himself liable to the action: *Jones v. Greeley*, 25 Fla. 629. Upon the other hand, the plaintiff cannot recover damages for any statements of

matters affecting his moral or other qualifications for the office for which he was a candidate, when made by an interested citizen to the appointing power, unless such statements were both false and malicious. Upon proper issues made, such falsehood and malice become issues of fact to be determined by the jury, guided by the rule stated, that the burden of proof is upon the plaintiff to affirmatively show the same. In such cases, although the alleged libelous matter should not be shown to be true by the defendant, yet if there was reasonable ground for him to suppose it to be true, and it was published by him in good faith under honest belief that it was true in statements of fact and in comment thereon, and was published with motives for the public good, without any private personal malice toward the plaintiff, then defendant is not liable to damages therefor: *Hart v. Townshend*, 67 How. Pr. 88.

The judgment of the circuit court is reversed and a new trial awarded.

WITNESSES—LEADING QUESTIONS.—A question, though not answerable by yes or no, is leading if it suggests the response which the question desires: *People v. Mather*, 21 Am. Dec. 122; *Snyder v. Snyder*, 6 Binn. 483; 6 Am. Dec. 493; *Stringfellow v. State*, 26 Miss. 157; 59 Am. Dec. 247. See, especially, the extended note to *Turney v. State*, 47 Am. Dec. 82.

LIBEL—MALICE—BURDEN OF PROOF.—If the matter complained of as libelous is privileged, the burden of proving malice lies on the plaintiff: *Bearce v. Bass*, 88 Me. 521; 51 Am. St. Rep. 446, and note.

LIBEL — PRIVILEGED COMMUNICATIONS. — QUALIFIED privilege exists in cases where some communication is necessary and proper in the protection of a man's interest: *Smith v. Smith*, 73 Mich. 445; 16 Am. St. Rep. 594, and note. See, also, the note to *Bodwell v. Osgood*, 15 Am. Dec. 232.

SINGLETON v. STATE.

[83 FLORIDA, 297.]

CONSTITUTIONAL LAW—PARDONING POWER.—Under a provision of a state constitution vesting in the governor and other officers named therein power to remit fines and forfeitures, to commute punishment, and grant pardons after conviction, the pardoning power is vested exclusively in such persons; and an act of the legislature purporting to restore a person named therein to civil rights, and reciting that he has been found not to be guilty of the crime of which he was convicted and sentenced to punishment, is unconstitutional and void.

A PARDON BLOTS OUT THE CRIME COMMITTED, and removes all disability resulting from the conviction.

AM. ST. REP., VOL. LVI.—12

PARDONING POWER, LEGISLATIVE ACTS, WHEN INFRINGE UPON.—If, by the statutes of the state, a conviction of larceny disqualifies a convict as a witness, this disqualification is a part of his punishment for the crime, and to remove the disqualification is an exercise of the pardoning power, and therefore a statute purporting to remove it is void where the pardoning power has by the constitution been vested in the governor and other officers named therein.

CHANGE OF VENUE—DISCRETION OF TRIAL COURT.—Though an accused is always entitled to be tried by an impartial jury, the ruling of a trial court denying an application for a change of venue in a criminal cause will not be disturbed, unless it appears that such court acted unfairly to permit a palpable abuse of sound discretion.

Wall & Stevens, for the plaintiff in error.

W. B. Lamar, attorney general, for the state.

MABRY, C. J. The plaintiff in error was indicted, tried, and convicted of murder in the first degree, and from the sentence of the court imposing the death penalty a writ of error has been sued out.

An error was committed during the progress of the trial of the cause that will necessitate a reversal of the judgment rendered against the accused. The state introduced as a witness one Howard Bishop who testified to material and damaging facts against the accused. It is not deemed necessary to set out the testimony of the witness, as there can be no doubt that it bore directly upon defendant's guilt, was calculated to influence the jury, and, if improperly admitted, was harmful and cannot be considered otherwise than as reversible error. An objection was made to Bishop's testifying on the ground that he had been convicted in a court in this state of the crime of larceny, and under the statute he was not a competent witness. It was conceded that the witness, Howard Bishop, had been convicted at the spring term, 1889, of the circuit court for Marion county of the crime of larceny, and ²⁹⁹ was sentenced to six months' imprisonment in the jail of said county; but to remove and obviate the objection on account of this conviction the state offered in evidence and read to the court the act of 1895, chapter 4457, entitled "An act to restore Howard Bishop, late of Marion county, Florida, to civil rights." In the preamble to this act the conviction and sentence of Bishop, in the Marion county circuit court, for the larceny of a watch is recited; also that about a year subsequent to the conviction it was established to the satisfaction of the party to whom the watch belonged that Bishop was not guilty of the crime for which he had been convicted, and for the last five years he had lived in the city of Tampa, served on the police force of the city, and had con-

ducted himself uprightly as a man and officer. The provision of the act is, "that the said Howard Bishop be and is hereby restored to civil rights." Section 1096 of the Revised Statutes provides that persons convicted in any court in this state of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery shall not be competent witnesses. The constitution provides (Const., art. 4, sec. 11) that "the governor shall have power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days, for all offenses, except in cases of impeachment. In cases of conviction for treason, he shall have power to suspend the execution of sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve; and if the legislature shall fail or refuse to make disposition of such case, the sentence shall be enforced at such time and place as the governor may direct." Provision is ³⁰⁰ also made in the section for reports to the legislature by the governor of the fines or forfeitures remitted, or reprieves, pardons, or commutations granted. The twelfth section of the same article, as it stood when the act of 1895, *supra*, was passed, provided that "the governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment and grant pardons after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons." Under the amendment to this section, adopted this year, the secretary of state, comptroller, and commissioner of agriculture take the places of the justices of the supreme court. Article 2 of the constitution divides the powers of government into three departments—legislative, executive, and judicial—and provides that no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, except in cases expressly provided for by the constitution. In the distribution of the powers of government, the framers of our constitution had the right to lodge the pardoning power where they saw proper in the departments of government. We know from judicial history that the pardoning power was a part of the royal prerogative in England, and Chief Justice Marshall, in speaking for the court in *United States v. Wilson*, 7 Pet. 150, says: "As this power has been exercised from time immemorial by the executive of that nation,

whose language is our language, and to whose judicial institutions ours bear a close resemblance, ³⁰¹ we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." As to the exercise of the power under our system of government we must look to our organic law, the constitution. By the eleventh section of article 4 the governor alone is given power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days, for all offenses, except in cases of impeachment, and in cases of conviction for treason the legislature can pardon on the suspension of the sentence by the governor. The twelfth section of the article, as amended, confers power upon the governor, secretary of state, comptroller, commissioner of agriculture, and attorney general to permanently remit fines and forfeitures, commute punishment, and grant pardons after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons, and we are of the opinion that the pardoning power after conviction, conferred by this section upon the board of pardons designated, is exclusive, and that the legislature cannot exercise such power. The constitution of Missouri vested the pardoning power in the governor, and it was decided in *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 467, that such power belonged exclusively to the executive department, and could not be exercised by the legislature. The constitution of the United States confers upon the President the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, and Judge Story says (2 Story on the Constitution, sec. 1504) that "no law can ³⁰² abridge the constitutional powers of the executive department, or interrupt its rights to interpose by pardon in such cases." It was held in *Ex parte Garland*, 4 Wall. 333, that the pardoning power conferred on the President was not subject to legislative control. In this case it is said, in reference to the effect of a pardon, that it "reaches both the punishment prescribed for the offense, and the guilt of the offender. When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." This has been approved in an opinion of the justices of this court: *Advisory Opinion to Governor*, 14 Fla. 318. It is settled law that the pardon of an offense not only blots out the crime committed, but removes all disabilities resulting from

the conviction. "Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effects would only be a half-way relief. The doctrine now well recognized upon this subject is, that a pardon gives to the person in whose favor it is granted a new character and makes of him a new man. When extended to him in prison, it relieves him and removes his disabilities; when given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities": *State v. Baptiste*, 26 La. Ann. 134.

303 Under the section of the Revised Statutes referred to, a conviction of the crime of larceny in the courts of this state disqualifies the convict as a witness, and there can be no question that a pardon in such a case would restore his competency in this respect. From the conclusions stated, it is evident that an attempt on the part of the legislature to exercise any part of the pardoning power exclusively conferred upon the board of pardons by section 12, article 4, of the constitution, would be in conflict with that instrument, and therefore void.

The act relied on to qualify the witness, Bishop, provides for his restoration to "civil rights." There is, in a section in the suffrage and eligibility article of the constitution, a provision that no person convicted of felony by a court of record shall be qualified to vote at any election unless restored to civil rights, and within the meaning of this provision it may be that the elective franchise is embraced within the civil rights contemplated. To accomplish the purpose for which the act of 1895 is invoked, it must have the effect to relieve Howard Bishop from the disability of not being able to testify as a witness attaching, under the law, to the conviction of the crime of larceny. This disability is as much a part of the pains and penalties of the violated law as incarceration, and after conviction it attaches as surely as any other part of the punishment. In our judgment, the power to commute punishment and grant pardons for crimes after conviction has been conferred upon the governor, the secretary of state, comptroller, commissioner of agriculture, and attorney general, and it is not competent for the legislature to exercise such power. In this view, it is not necessary to determine definitely 304 whether the restoration to civil rights, as provided in the

act, would include the restoration of competency to testify as a witness, lost by reason of the conviction of crime, as Bishop could not testify by virtue of the act unless it had such effect, and to so construe it would place it in antagonism to the constitution. Bishop should not have been permitted to testify, and for the error in this respect the judgment must be reversed. In addition to the authorities cited, the following bear on the subject of pardons and its proper exercise: *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458; *People v. Bowen*, 43 Cal. 439; 13 Am. Rep. 148; *People v. Court of Sessions*, 141 N. Y. 288; *Haley v. Clark*, 26 Ala. 439; *State v. Fleming*, 7 Humph. 152; 46 Am. Dec. 73; *Ogletree v. Dozier*, 59 Ga. 800; *Baldwin v. Scoggin*, 15 Ark. 427; *State v. Nichols*, 26 Ark. 74; 7 Am. Rep. 600; *Sterling v. Drake*, 29 Ohio St. 457; 23 Am. Rep. 762; *Attorney General v. Brown*, 1 Wis. 513; *People v. Moore*, 62 Mich. 496; *State v. McIntire*, 1 Jones, 1; 59 Am. Dec. 566, and note.

The accused made an application for a change of venue, upon which affidavits pro and con were filed. The application was denied. There was also a plea in abatement of the indictment, alleging certain defects in the organization of the grand jury that presented the indictment, and there were certain proceedings on this plea. We do not think there was reversible error in the rulings on the application for change of venue and plea in abatement. Under the laws of this state, an accused is entitled to be tried by an impartial jury, and when it shall appear to the trial judge that a fair ³⁰⁵ and impartial trial cannot be had in the county where the offense was committed, he should direct that the accused be tried in another county. Under our decisions, this matter is left largely to the discretion of the trial court, and its ruling on such matters will not be disturbed, unless it appear from the facts presented that the court acted unfairly and committed a palpable abuse of a sound discretion.

We cannot anticipate what the evidence will be on another trial of the case, and do not consider the instructions of the court to the jury; but we direct attention to the general proposition stated in one of the instructions, that an aggressor in a personal difficulty can never be heard to acquit himself of liabilities for its consequences on the ground of self-defense. Without considering now whether this portion of the charge, in the terms stated, contains a correct proposition of law under any state of circumstances, it may, so far as we can see, be omitted or modified in this case.

The judgment will be reversed and a new trial ordered.

PARDONS—EFFECT OF.—A pardon generally removes the future consequences of the criminal act as completely as if it had never been committed, and restores the offender to all his civil rights: *Diehl v. Rodgers*, 169 Pa. St. 316; 47 Am. St. Rep. 908, and note. See, also, the extended note to *State v. McIntire*, 59 Am. Dec. 578.

PARDONS—CONSTITUTIONAL LAW.—The power to pardon criminals given by the state constitution cannot be restricted or its operation limited by statute: *Diehl v. Rodgers*, 169 Pa. St. 316; 47 Am. St. Rep. 908. The pardoning power is by the constitution of Missouri vested in the governor and cannot be exercised by the legislature: *State v. Sloss*, 25 Mo. 291; 69 Am. Dec. 467, and note.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

DOBSON v. MORE.

[164 ILLINOIS, 110.]

CORPORATIONS.—THE POWERS OF AN AGENT OF A CORPORATION to enter into contracts for and on behalf of the corporation are limited to those matters concerning which the charter and by-laws of the corporation authorize it to contract.

CORPORATIONS—GUARANTY BY AGENT.—A general manager of a corporation, empowered by its by-laws to bind it by contracts for merchandise, and to sign notes, drafts, and acceptances, in payment of any proper indebtedness of the corporation, has no authority to bind it as a guarantor for the indebtedness of another.

CORPORATIONS—GUARANTY BY OFFICER.—A person who accepts a contract of guaranty from the general manager of a corporation purporting to bind it for his private indebtedness, knowing that such contract is not within the scope of the business in which the corporation is engaged and is beyond the power of the manager to make, cannot recover on the contract.

Action against the insolvent estate of the Wilson and Bayless Company, a corporation, based upon a guarantee by it of five notes executed by George Wilson, Jr., and T. P. Bayless, payable to the order of John and James Dobson for three thousand six hundred and twenty-seven dollars and five cents. Each note was guaranteed in the following form: "For value received, we hereby guarantee the payment of the within note at maturity. Wilson & Bayless Company, Geo. Wilson, Jr., General Manager." Judgment for the defendant, and plaintiffs appealed.

Dent & Whitman, and L. S. Hodges, for the appellants.

Bulkley, Gray & More, for the appellee.

¹¹³ **CRAIG, J.** At the time the guaranty was executed George Wilson, Jr., was president and general manager of the

Wilson & Bayless Company, and Bayless was vice-president and treasurer. Section 6, chapter 32, of the Revised Statutes of 1874, under which this corporation was organized, among other things, provides: "The officers of the company shall consist of a president, secretary, and treasurer, and such other officers and agents as shall be determined by the directors or managers; and the directors or managers may adopt by-laws for the government of the officers and affairs of the company, provided they are not inconsistent with the laws of this state." Under this provision of the statute, the corporation adopted the following by-law:

"The practical conduct of the business of the company and the supervision of the details shall be intrusted to some discreet person, who shall be appointed by the board of directors, and who shall be known as the 'general manager.' Such general manager shall have the direct supervision and control of the store, warehouses, and offices of the company, shall employ and at his pleasure discharge all of the porters, truckmen, clerks, and shall fix their compensation, and shall also act as the purchasing agent of the company, and shall have power to bind it by his contracts for merchandise. He shall have authority to sign notes, drafts, and acceptances in the name of the company, and to make checks upon the ¹¹⁴ company funds in bank for the payment of any proper indebtedness of the company."

Under the by-law, George Wilson, Jr., was authorized to bind the company by contract for merchandise and to sign notes, drafts, and acceptances, and execute checks for the payment of the indebtedness of the company, but the language of the by-law confers no authority whatever on him to bind the company as a guarantor for the indebtedness of another. There was no action of the board of directors of the company authorizing him to bind the company as security or as guarantor for the debt or obligation of another. It is true that Wilson executed the guaranty as general manager, but the powers of an agent of a corporation to enter into contracts for and on behalf of the corporation are limited to those matters concerning which the charter and by-laws of the corporation authorized it to make contracts: *Downing v. Mount Washington Road Co.*, 40 N. H. 235.

McLellan v. Detroit File Works, 56 Mich. 579, is a case quite similar to the case under consideration, and, in the decision of the case, Chief Justice Cooley, among other things, said: "The case was such that the plaintiff must be deemed to have accepted renewals of the notes with knowledge of all the facts. They held partnership notes and they accepted corporation notes in

renewal, and they must be deemed to have known that an officer of a corporation can have no general authority to give the notes of the corporation to take up the outstanding obligations of members. Special authority would be required to empower him to do so, and those persons who should venture to take such notes from him must at their peril ascertain that the special authority has been conferred. In cases like *Farmers' etc. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457, *Littell v. Fitch*, 11 Mich. 526, *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192, and other cases cited on behalf of the plaintiff to the point that notes given by the proper officer of a corporation, or by a partner in the name of the corporation ¹¹⁵ or partnership, in the regular course of business, must be deemed given with due authority, have no application here, for the very obvious reason that a corporate note given for an individual obligation is not given in the regular course of business, but, presumptively, is *ultra vires*. An officer of a corporation can never have implied authority to give such notes. They are, presumptively, accommodation notes given to take up the notes of third parties, and, in order to support them, it would be necessary to overcome the presumption against authority by express affirmative showing, the general authority to make notes for the corporation being insufficient for the purpose: *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Perry v. Simpson etc. Co.*, 37 Conn. 520." See, also, *National Park Bank v. German-American Mut. Warehouse Co.*, 116 N. Y. 292; *Morawetz on Private Corporations*, sec. 423.

In *Lucas v. White Line Trans. Co.*, 70 Iowa, 546, 59 Am. Rep. 449, it was held that where a party makes with the officers of a corporation a contract beyond the power of the corporation as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders a ratification of the authority to make the contract would not make it valid. Here the president and manager of the corporation had no authority from the board of directors to enter into a contract of guaranty in behalf of the corporation, and in the absence of such authority he could not bind the corporation beyond the scope of the business in which the corporation was engaged. Appellants knew, when Wilson made the contract of guaranty, that the contract was not within the scope of the business in which the corporation was engaged and was a contract beyond his power to make, and having knowledge of such fact they cannot recover.

The judgment of the appellate court will be affirmed.

CORPORATIONS—GENERAL POWER OF OFFICERS AND AGENTS TO CONTRACT.—Acts done in excess of the power conferred by charter are void, and cannot divest the corporation of any right in or to any property belonging to it: *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815, and note. A corporation acting within the scope of its authority will be bound by a parol contract made by an authorized agent to the same extent as an individual under similar circumstances: *Racine etc. R. R. Co. v. Farmers' Loan etc. Co.*, 49 Ill. 331; 95 Am. Dec. 595, and note.

ASHLEY WIRE COMPANY v. ILLINOIS STEEL COMPANY.

[164 ILLINOIS, 149.]

CORPORATIONS — MORTGAGE — DEFENSE ON FORECLOSURE.—The irregularity of a meeting of the directors of a corporation at which a mortgage of its property is executed is no defense to an action to foreclose the mortgage, provided the corporation has taken no steps to disaffirm the proceedings had at such meeting or to repudiate the mortgage.

CORPORATIONS—MEETINGS—NOTICE.—A record of a meeting of the directors of a corporation is notice thereof to its members.

CORPORATIONS — MEETINGS — IRREGULARITY OF AS AFFECTING MORTGAGEE.—The irregularity of a meeting of the board of directors of a corporation, at which a mortgage of its property is executed, does not affect the mortgagee, dealing in ignorance and good faith with the corporation.

CORPORATIONS — IRREGULARITIES — NOTICE.—Third parties dealing with corporations in good faith and within the general scope of the corporate powers are protected against all irregularities in the performance of corporate acts, of which they have no notice.

CORPORATIONS—BY-LAWS.—THIRD PARTIES who deal with a corporation in good faith and without notice, are not bound by rules adopted for its government, nor required to know the provisions of its by-laws. They have a right to assume that such rules and by-laws have been complied with.

CORPORATIONS—MEETINGS—NOTICE OF.—Although the signature of the secretary of a corporation to a notice of a director's meeting is made by a rubber stamp in the hands of the president, this does not affect the validity of the meeting attended by the secretary, who records its proceedings, treats it as regularly called, and its directions are binding on him.

CORPORATIONS—MEETINGS—NOTICE.—Notice of an adjourned meeting of the board of directors of a corporation, called to consider the report of a committee appointed at a former meeting to transact ordinary business of the corporation, need not state the business to be transacted at such adjourned meeting.

CORPORATIONS — MEETINGS — NOTICE. — EVIDENCE that notice of a meeting of the board of directors of a corporation was deposited in the postoffice, properly stamped and addressed to a director, is *prima facie* proof that he received it, if the corporate by-laws are silent as to how such notice should be served. Such proof is not overcome by the fact that such director fails to remember receiving the notice, or has an impression that he did not receive it.

CORPORATIONS—MEETINGS.—A BY-LAW of a corporation requiring regular meetings of its directors to be held at its general office, does not prevent special meetings from being held at any place.

CORPORATIONS — MORTGAGE — VALIDITY.—A mortgage of corporate property is not invalid because of special provisions therein not shown by the record of the meeting of directors at which the mortgage was executed, if a draft thereof was before the meeting and its provisions were considered at that time.

CORPORATIONS—MORTGAGE—PRESUMPTIONS.—A mortgagee in a mortgage made by a corporation to secure an existing debt and extending its payment is entitled to rely on the same presumptions as to its regularity and validity as obtain in other cases.

G. S. House, for the appellant.

Gamsey & Knox, and E. P. Prentice, for the appellee.

In the court of appeals the following opinion was written by

150 "CARTWRIGHT, J. Defendant in error filed its bill March 7, 1894, in the circuit court of Will county, to foreclose a mortgage executed July 19, 1893, by the Ashley Wire Company, by the hand of C. H. Carpenter, its president, under its corporate seal, attested by James R. Ashley, its secretary, and recorded on the same day in the recorder's office of said county, where the mortgaged premises were situated, securing the payment of a promissory note for \$67,246.24, due in two years, with interest at five and a half per cent, and providing for the insurance of the buildings on the mortgaged premises in the sum of \$50,000 for the benefit of the mortgagee. It was stipulated in the mortgage that, in default of payment of interest 151 when due, the whole principal and interest should, at the option of the mortgagee, become due and the mortgage be foreclosed, and it was alleged in the bill that default had been made in the payment of interest due January 19, 1894, wherefore the mortgagee had elected to declare the whole indebtedness due. The other plaintiffs in error were made defendants with the Ashley Wire Company under averments that they had or claimed some interest in the mortgaged premises which it was alleged were subject to the mortgage. It was also averred that the Ashley Wire Company was insolvent, and that George W. Bush had been appointed receiver of its property and estate, in pursuance of a bill filed for that purpose by the First National Bank of Joliet.

"The Ashley Wire Company answered the bill, admitting that on July 19, 1893, it was largely indebted to the complainant, and that on that day the mortgage in question was duly recorded in the recorder's office of Will county, purporting to be executed by it to secure such indebtedness, but insisting that the mort-

gage was not binding on it because its officers acted without lawful authority in the execution of such mortgage. It was admitted that Bush was receiver of the company, and it was claimed that when the mortgage was executed the company was insolvent, and that complainant was aware of that fact. The First National Bank of Joliet, John Y. Brooks and the Will County National Bank of Joliet filed answers, claiming rights as judgment creditors and denying the validity of the mortgage. George W. Bush answered as receiver, setting up his appointment as such receiver and his possession of the property, and neither admitting nor denying the other allegations of the bill.

"Replication having been filed, the proofs were heard by the court, and a decree was entered finding that the mortgage was a valid and binding security, and for a foreclosure of the same, and a sale of the mortgaged premises to pay the sum of \$72,752.86, being the amount ¹⁵² due on the note together with moneys advanced by complainant for insurance and interest thereon, and \$500 solicitor's fees, all of which were provided for by the terms and conditions of the mortgage. The only question in the case is, whether the note and mortgage were binding obligations of the Ashley Wire Company.

"At the hearing, the complainant produced and offered in evidence the note described in its bill, dated July 19, 1893, for \$67,246.24, payable two years after date, with interest payable semi-annually at five and a half per cent, signed by the Ashley Wire Company, under the hand of C. H. Carpenter, its president, attested by J. R. Ashley, its secretary, and also the mortgage in said bill described securing the payment of said note, with the provisions above stated, duly executed by the Ashley Wire Company, under the hand of its said president, and its corporate seal attested by its said secretary, together with the certificates of acknowledgment and recording thereof in accordance with the averments of said bill. Complainant also proved that default was made in the payment of the installment of interest due January 19, 1894; that the Ashley Wire Company had no insurance on the mortgaged property after January 1, 1894, and that complainant effected such insurance and paid \$1500 in premiums on account of the same. It was then agreed by defendants that if complainant was entitled to a decree of foreclosure it should recover \$1500, and \$69.44 interest thereon, for insurance premiums. By this proof the complainant made out a prima facie case that the note and mortgage were valid obligations of the Ashley Wire Company, executed by its authority, and the defend-

ants took upon themselves the burden of proving that it was not so executed: *Smith v. Smith*, 62 Ill. 493; *Sawyer v. Cox*, 63 Ill. 130; *Wood v. Whelen*, 93 Ill. 153; *McDonald v. Chisholm*, 131 Ill. 273; *Glover v. Lee*, 140 Ill. 102; *Atwater v. American etc. Bank*, 152 Ill. 605.

“It was contended by the defendants that the note and mortgage were not binding on the Ashley Wire Company ¹⁵³ because they were executed by its officers under authority conferred at a meeting of its board of directors which was not regularly convened in accordance with its by-laws, and which was held at a place not authorized by such laws, and also that the special provisions of the mortgage, such as declaring the debt due on default in payment of interest, were not binding because not specified in the record of the meeting. To support their claims the defendants offered evidence, and the proofs established the following facts: The by-laws of the Ashley Wire Company provided that its business should be managed by a board of seven directors, to be elected by the stockholders at their annual meeting to be held on the first Thursday after the tenth day of July in each year. The officers of the company were a president, secretary, and treasurer, to be appointed by the board of directors from their own number, as soon as practicable after the election of such board. The by-law regulating meetings of the board of directors is as follows:

“‘Fourth. Regular meetings of the board of directors shall be held quarterly, the first Thursday in the month, commencing October 5, 1882, at the office of the company in Joliet. The president or any two directors shall have the authority to call special meetings of the directors when in his or their judgment he or they think the interests of the company demand their attention. And he or they shall require the secretary to give a reasonable notice to such directors, in writing or in person, of the time of such meeting, and at each regular or called meeting the secretary shall present a full report of the business transacted since the previous meeting of the board. Four directors shall constitute a quorum to do business at all meetings.’

“There was also a resolution of the board that the notice to directors should be in writing. An annual meeting of the stockholders was held at the office of the corporation in Joliet, July 13, 1893, at which H. S. ¹⁵⁴ Smith, S. H. Sweet, C. H. Conover, E. C. Hager, Charles Pettigrew, C. H. Carpenter, and J. R. Ashley were elected directors. Immediately on the adjournment of the stockholders’ meeting, the board of directors met,

all being present except Hager. At that meeting C. H. Carpenter was elected president and J. R. Ashley was elected secretary. The president and C. H. Conover and S. H. Sweet were appointed a committee to confer with complainant, the Illinois Steel Company, concerning its request for the cancellation of a contract under which the Ashley Wire Company had been buying wire rods from complainant, and the committee was directed to make such arrangements for the adjustment of the account due complainant as might be thought best, and to report at the next meeting of the board of directors. The board then adjourned subject to the call of the president. The committee so appointed conferred with complainant, and on July 15, 1893, the president called a meeting of the board of directors, of which a notice was mailed to each director July 15, 1893, except the president and secretary. The notice mailed to the director Hager was as follows:

“‘July 15, 1893.

“‘E. C. Hager, Esq., Bay View, Mich.

“‘Dear Sir: Pursuant to adjournment, the directors of the Ashley Wire Company are hereby requested to meet Wednesday, July 19, 1893, at the hour of 1 P. M., at the Union League Club rooms, Chicago. Matters of importance will be brought before this meeting for consideration, and a full attendance is requested.

“‘J. R. ASHLEY, Secretary.

“‘By order of the President.’

“The other notices were the same as this, except in the address. The president wrote the notices, and affixed the name of the secretary by means of a rubber stamp which was in the office of the corporation. In pursuance of the notice, a meeting was held at the time and place therein mentioned. H. S. Smith and Charles Pettigrew, two of the directors, sent to that meeting their resignations as directors, because they were directors of the Illinois ¹⁵⁵ Steel Company and deemed it improper to act in the matter of its claim. E. C. Hager did not attend the meeting, but S. H. Sweet, C. H. Conover, C. H. Carpenter, and J. R. Ashley, the remaining directors, were present and participated in the meeting, and its proceedings were duly entered in the records of the corporation. Every director either received written notice of the meeting or was present and took part in it, unless the notice mailed to Hager failed to reach him. The account with complainant was adjusted and was then due, the rate of interest to be paid was agreed upon by conference with the officers of complainant, the extension of time and security was

agreed upon, and the execution of a note and mortgage for the unpaid account, due on or before two years from date, with interest at five and one-half per cent, was authorized.

"The alleged illegality in convening this meeting of July 19th consists in the want of a statement in the notice of the particular business to be done at the meeting, the fact that the president affixed the secretary's name and sent the notice by mail, and a claim that the notice was not received by the director Hager. It is also argued that the meeting could only be held at the office of the corporation in Joliet. In our judgment, a defense of this character is not now available to the defendants. The act sought to be impeached was within the general powers of the board of directors, and it has never been disavowed by the corporation. The record of the meeting of July 19th is the last entry in the record-book of the corporation. No meeting of directors or stockholders has been held, and no action has been taken by the corporation, or any director or stockholder, in disaffirmance of the proceedings at that meeting or in repudiation of the note or mortgage. The record of the meeting in the book of the corporation was notice to its members, and the mortgage was recorded on the day of its execution. If the notice mailed to Hager was not received, he made no objection and gave ¹⁵⁶ no notice of that fact, although informed by the records of the corporation and the public record of what had been done. Those affected by the act unquestionably may, and apparently do, prefer to ratify it as just and proper even if irregularly done, and, of course, if that is the case, the other defendants have no right to interfere. All that has been done in the way of questioning the act of the agents of the corporation is the filing of an answer by a solicitor, presumably employed and directed by the president, who executed the note and mortgage. The repudiation of its obligation has never been authorized by the directors or stockholders, and we think that the mortgage is binding by acquiescence and ratification: *Atwater v. American etc. Bank*, 152 Ill. 605; *Louisville etc. Ry. Co. v. Carson*, 151 Ill. 444.

"But if the alleged defenses as here made are proper to be considered, the first question that arises is, whether complainant can be affected by a failure of the corporate agents to observe the rules and regulations enacted for the internal management of the corporate affairs. When the mortgage was made, the records of the corporation showed that power to make it had been conferred by the governing body of the corporation having the management of its corporate affairs. The indebtedness was

created in the ordinary course of business, by the purchase of wire rods, from which the corporation manufactured its product. It was due and unpaid, and complainant dealt in good faith, without notice of any irregularity. Defendants' claim is, that the security so taken is invalidated if they are able to show that the signature of the secretary to the notices was made with a rubber stamp held by the hand of the president, or that the notice mailed to Hager in ample time, under a presumption that he received it, was not, in fact, received. There are cases where it has been held essential to the validity of an instrument that the meeting at which it was authorized was called in accordance with the rules governing the relations ¹⁵⁷ between the corporation and its agents, but they have never been recognized as affecting strangers to the corporation in this state. The rules laid down in such cases originated when the relations of corporations to the general business of the country were widely different from what they now are. Not many years ago corporations were few in numbers, and organized for the execution of enterprises beyond the scope of such capital as could be aggregated in a partnership. Such concerns were naturally ponderous and moved with much formality in the execution of their business. Their relations to the public generally were very limited. But now the every-day business of the country is transacted by corporations. Every city and village is full of them, and they have largely supplanted the partnership in the store and the shop. The necessities of business require that the public, dealing with their officers in good faith on the strength of apparent power, should be protected against such claims as are here made. The courts of this state have always protected third parties dealing in good faith with corporations within the general scope of their powers. In *Smith v. Smith*, 62 Ill. 493, it was held that third parties dealing with a corporation are not bound by rules adopted for its government or required to know the provisions of its by-laws, which are private and only accessible to the officers of the corporation, and that a deed not countersigned by the secretary was valid although the by-laws required it to be so countersigned. In *Union etc. Ins. Co. v. White*, 106 Ill. 67, although the corporation in that case was a foreign one, the rule was declared generally that rules and by-laws are not open to inspection by the public, and that persons not connected with the corporation are not presumed to know what they contain. We do not think that complainant was bound to know what provisions or regulations had been made by the Ashley Wire Company for

convening ¹⁵⁸ the meeting of its agents or governing body, but had a right to assume that they had been complied with.

"However, an examination of the objections shows them to be without merit. It certainly made no difference to anybody who held the rubber stamp, and if the secretary did not know when it was done, he attended the meeting, acted as secretary, recorded its proceedings and treated it as regularly called and its directions as binding on him. He ratified the call, and it affected nobody, in any view of the question.

"It was not necessary that the notice should state the business to be transacted, both because the meeting of July 13th was adjourned to meet at the call of the president, when the committee appointed about this business was to report, and the business to be transacted was ordinary business of which no statement was required. It should certainly not be regarded as extraordinary business for a corporation to pay or secure the payment of an account contracted in the ordinary business of the corporation.

"The evidence that notice of the meeting was deposited in the postoffice, properly stamped and addressed to Hager at Bay View, Michigan, on July 15, was prima facie proof that he received it: *Meyer v. Krohn*, 114 Ill. 574; *Young v. Clapp*, 147 Ill. 176. This was met by testimony of Hager that he had no recollection of receiving the notice; that he had tried to rack his brains so as to be positive about it, but was not able to be positive, and that he did not think that he received it. The presumption that the letter was received is founded upon the regularity and certainty with which the mail is carried and delivered. When letters are properly stamped and addressed, the uniformity with which they are received is such that the failure to receive such letter is a very unusual circumstance, and we do not think that the presumption was overcome by mere failure of Hager to recollect, or his impressions on the subject. The by-law ¹⁵⁹ was silent as to the manner in which written notice of a special meeting of the board should be served. If it had provided for notice by mail, it would be immaterial whether Hager ever received the notice which was properly sent in due time by that method. It would be unnecessary to inquire whether it was received or not. But, if the notice was received by Hager, it is equally immaterial by what means it was conveyed to him. We think that the circuit court was right in finding, from the evidence, that he did receive it, and therefore the method employed was of no consequence.

"The by-law required that regular meetings of the board of directors should be held at the office of the corporation in Joliet. The business done at this meeting was an exercise of a power of the board, as agents of the corporation, that might, in the absence of any prohibition, be performed at any place: *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439. In enacting the by-law, the restriction as to place was not applied to meetings generally, but was limited to the regular meetings, and special meetings could be held at any place that would otherwise be lawful. The board had several times met in Chicago without question or objection.

"As to the claim that the mortgage was invalid as to the special provisions not contained in the statutory form of mortgage, the proof is, that the draft of the mortgage was present at the meeting. The record of the meeting shows that complainant's proposition was that the note should draw six per cent interest, and, after a conference, it was agreed to accept five and one-half per cent. The draft of the mortgage is shown by the evidence to have been changed accordingly. Other provisions were talked of, and the same paper discussed and amended was executed on the same day. The resolution referred to the identical mortgage executed.

"None of the objections made seem to us to have any force.

100 "It is urged that the numerous cases in which the rights of strangers to corporations dealing in good faith with their officers in the exercise of apparent power conferred upon such officers, as agents of the corporation, against claims that the act was not in fact legally authorized, do not apply to this case, because the mortgage was made to secure an existing debt. The debt was due, and by making the mortgage the corporation obtained an extension for two years. It was not made as a donation, and we see no reason to deny complainant the right to rely on the presumptions that obtain in other cases.

"The decree will be affirmed."

102 **BAKER, J.** We not only have had the benefit of an oral argument, but have also carefully read and examined as well the briefs and arguments filed in the appellate court as the elaborate additional briefs and arguments submitted in this court. We concur in the judgment of the appellate court and in the reasons given for its decision. There is nothing in the case that requires any further expression of opinion on our part. Additional grounds that would go in affirmance of the judgment might be

stated, but we deem it unnecessary to add to what has already been said.

The judgment is affirmed.

Mr. Justice Cartwright took no part in this court.

CORPORATIONS—MEETINGS—RECORD AS NOTICE.—Minutes of the proceedings of a meeting of the stockholders of a corporation raise a presumption that due notice thereof was given, and that its proceedings were regular and lawful: *Benbow v. Cook*, 115 N. C. 324; 44 Am. St. Rep. 454.

CORPORATIONS—MEETINGS—NECESSITY FOR NOTICE.—Each director must, under the provisions of the Civil Code of California, have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings: *Thompson v. Williams*, 76 Cal. 153; 9 Am. St. Rep. 187, and note. This question will be found further discussed in the note to *Benbow v. Cook*, 44 Am. St. Rep. 460, and the extended note to *Stow v. Wyse*, 18 Am. Dec. 102.

CORPORATIONS—THE VALIDITY OF CORPORATE ACTS done or authorized at a meeting not properly called is the subject of the extended note to *Stow v. Wyse*, 18 Am. Dec. 102.

CROCKER v. MANLEY.

[164 ILLINOIS, 282.]

FRAUD — FALSE REPRESENTATIONS — MATTERS OF OPINION.—Statements made by an owner to induce another to purchase mining stock, to the effect that the mine was rich in silver, would pay a dividend of from twenty to one hundred per cent, and that there was enough ore on the dump to pay the par value of the stock, are matters of opinion, and, though false, do not constitute fraud.

FRAUD.—FALSE REPRESENTATIONS TO CONSTITUTE FRAUD must relate to a material fact, and be made with knowledge of their falsity and with an intent that they shall be acted upon, and they must be acted upon by another, to his injury, under a reasonable belief that they are true.

FRAUD—RESCISSION.—If a purchaser, before making a contract for the purchase of mining stock, personally visits and examines the mine, he cannot rescind his contract of purchase on the ground of false representations made by the vendor as to the value of the mine.

Action to rescind a contract for the purchase of mining stock, and to set aside a conveyance made in payment for such stock, on the ground that the contract was induced by false representations and fraud. Judgment for plaintiff, and defendant appealed.

S. S. Gregory, for the appellant.

W. Olds, C. F. Griffin, and W. S. Oppenheim, for the appellee.

²⁸⁹ CRAIG, J. In regard to the allegations in the bill as to the organization of the company, its ownership of the mines, stock owned by Crocker, and that he was treasurer and manager, there is no controversy, it not being claimed that there was any falsity as to these averments. In reference to a large portion of the other averments of fact set up and relied upon in the bill, it will be found, upon due examination, that in the main they are not representations of fact, but, on the other hand, they are mere matters of opinion. Under the latter head may be mentioned the following: That the mines were rich with silver, and that they would pay a dividend of from twenty to one hundred per cent; that there was enough silver ore on the dump at the mines to pay the par value of the stock, and other like statements. These allegations of mere matter of opinion, as will be seen from the authorities hereinafter referred to, whether false or true, do not ²⁹⁰ form a basis upon which an action can be founded. There are, however, some four or five allegations of fact, as contradistinguished from allegations of opinion, which we will consider.

In regard to the allegations that the vein runs from east to west, lacking forty feet of a half mile, that it varies in width from six to fifty feet, and that the depth of the vein is two hundred feet, from an examination of the testimony of the defendant and the complainant, and the superintendent, Ewing, and the report of Bridge, it will be found such allegations were substantially correct.

The next allegation of fact is, that the mine was what was known as a fissure vein. Crocker testified that the vein was a fissure vein, as that term is understood. He testified: "A fissure vein, according to Hughes' dictionary, is a longitudinal opening with a foreign substance in it. The vein is a fissure vein in the San Javier and Guadalupe mines." In this he seems to be corroborated by Bridge and contradicted only by Ewing, and Ewing's testimony is contradicted by his statement to Manley at the time he visited the mine. Under the evidence it cannot be said that this statement was false.

The next allegation of fact is, that a carload of ore taken from the mine had been sent to the Monterey smelter, which assayed sixty-eight ounces per ton. The defendant, Crocker, testified that, before the statement was made, and before he incorporated it in his written statement to Manley, Jaurequeberry, the manager, informed him of the fact, and that Ewing, who was also in charge of the mines, corroborated the statement. The statement

was, therefore, made by the defendant in good faith, believing it to be true. Whether the statement was true or false is left in doubt from the evidence. A carload of ore was shipped to Monterey, but whether it was shipped from the mine in question or some other mine is left in doubt from the evidence. Ewing testified that he shipped the ore from the Incarnacion mines, ²⁹¹ while the witness Shope testified that he shipped a half carload, but not from the mine in question. It may be true that this statement was false, but there is so much uncertainty and doubt in regard to what the fact really was that it would not be safe to convict a person of fraud on such uncertain testimony.

The next allegation of fact was, that "our general assays of number of ounces per ton reaches now over two hundred ounces per ton." This statement was made before the defendant had worked the mine, and, of course, had reference to assays of samples of ore, and it appears from the testimony that assays of sample or specimen ores run higher than the ore when milled in large quantities, and we find no evidence in the record that the statement was not true.

There is also an allegation that there was a statement that the mill at the mines was to be capable of crushing fifty tons per day. The writing containing the defendant's statement contains no such averment, and Crocker testified that in all the conversations the talk was that the mill was to be a ten-stamp mill. In this he is corroborated by C. N. Harold, who testified that Crocker said he would have the mill running in ninety days, and the capacity was to be thirty tons a day, and he intended to add more soon.

Under the facts established by the evidence, was the complainant entitled to a decree?

In *Southern Development Co. v. Silva*, 125 U. S. 247, the supreme court of the United States lays down the rule in regard to a recovery in a case of this character, as follows: "1. That the defendant has made a representation in regard to a material fact; 2. That such representation is false; 3. That such representation was not believed by the defendant, on reasonable grounds, to be true; 4. That it was made with the intent that it should be acted upon; 5. That it was acted on by complainant to his damage; and 6. That ²⁹² in so acting on it the complainant was ignorant of the falsity, and reasonably believed it to be true."

In regard to the kind or character of representations which are actionable, Bigelow on Fraud, volume 1, page 473, lays down the rule that the representations must consist of matters of fact, and not of opinion.

In *Hemmer v. Cooper*, 8 Allen, 334, in speaking in regard to representations of a vendor in regard to the price he paid for real estate, the court said: "The representations of a vendor of real estate to the vendee as to the price which he paid for it are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them, for it is settled that, even when they are false and uttered with a view to deceive, they furnish no ground of action: *Medbury v. Watson*, 6 Met. 246; 39 Am. Dec. 726; and cases there cited." In *Holbrook v. Conner*, 60 Me. 578, 11 Am. Rep. 212, the same doctrine is announced.

In *Hauk v. Brownell*, 120 Ill. 161, 163, the cases from Massachusetts and Maine are cited with approval, and it is said: "Where the vendor and vendee are dealing at arm's length with each other, the representations of the former as to the cost of his property, even though false and made with a view to deceive, will furnish no ground of action. They are looked upon merely as representations in regard to value, urged for the purpose of enhancing the price, and any purchaser who relies upon them is considered as too careless of his own interest to be entitled to relief."

In *Noetling v. Wright*, 72 Ill. 390, 392, in speaking in regard to representations made by a vendor of property as to value, the price he has been offered or the good qualities of the property, it is said: "Statements of this character do not in anywise relieve the purchaser from the responsibility of investigation into the true condition or value of the property about to be purchased. Such statements are only regarded as *gratis dicta*, and as is well said by Kerr in his work on *Fraud and Mistake*, 293, page 84: 'A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his imprudence.'"

Tuck v. Downing, 76 Ill. 71, 95, was a bill to rescind a contract for fraud where mining stock had been sold, as is the case here, and, in discussing what may be regarded as mere opinion or a statement of fact, it is among other things said: "The extravagant declarations of appellant after his return to Erie with the committee of examination, and made in their presence, that a silver mine with copper croppings was an inexhaustible mine of wealth; that the 'Aqua Frio' and 'Black Metallic' were the biggest things in Utah; that situated at the Fork Hills was greatly to their advantage; that they were well-developed mines,

with well-defined veins; that he had never seen, in all his experience, such a 'blow out;' that a furnace ought to be erected at once, as the ore could be mined, and all the money put into it could be got out in a few months—was mere gassing, and for the purpose of extolling what these men, through their committee, had seen, and could judge of the prospects and promise for themselves. There was nothing unlawful, or prohibited in law, in all this. It was after this examination and report by Camp and Barr the share was bought by complainant and the note in question executed, and a deed delivered and accepted for the property. It is impossible their statement should be regarded as anything more than opinions, for no man can tell how a discovery like this may result. Appellee could have understood them in no other sense, and the same may be said of the report of the committee. They were opinions founded on facts as they appeared to them." In *Southern Development Co. v. Silva*, 125 U. S. 247, *Tuck v. Downing*, 76 Ill. 71, was cited and a large portion of the opinion quoted with approval. ²⁹⁴ In *Farnsworth v. Duffner*, 142 U. S. 43, the same doctrine is announced.

There are other authorities holding to the same doctrine, but it will not be necessary to cite them here. It is manifest, under the law as established in the text-books and in the decisions of the different courts, the complainant has failed to make out a case wherein he was entitled to recover.

There is another fact connected with the case that has an important bearing. It appears that in the latter part of April, 1893—long before the conveyance was made which complainant seeks to set aside—he determined to visit the mine for the purpose of determining for himself whether the mine was in fact what it was represented to be. He went there and was met by Ewing, the superintendent, O. P. Crocker, a son of the defendant, McGuire, and a Mexican. He made a thorough examination of the mine and its prospects. He walked over the grounds, went into the shafts, made selections of specimens for assay, placed each specimen in a small sack prepared for that purpose, marked each one and then placed the small sacks in a large one, and brought the specimens home with him and had them assayed. Upon his return he gave glowing accounts of the mine and the richness of its ore. The witness Harold detailed a conversation he had with Manley after his return, substantially as follows: "I think I asked him something about the quantity of ore he found, and as we looked at each sample I would ask him how much. He would make the remark that there were thou-

sands of tons, and of others not quite so much, but he said there was plenty of ore, and again I think he made the statement to me that there was all the ore there that you could wish for." On cross-examination, the witness said, referring to Manley: "He said there was a great quantity of ore on the dump, and that a number of assays were made from the dump which showed it to be very valuable, and judging ²⁹⁵ from the quantity on the dump he thought there was one hundred thousand dollars on the dump. He also based his opinion on what he saw in the mine—not only what he saw in the mine, but the length of the mine where they could trace the ore." Other witnesses corroborated these statements.

When the complainant was at the mine he was afforded every facility to examine and investigate that he desired, and the specimens which he brought away were of his own selection. On the hearing, the court found that no fraud or deception was practiced on the complainant in the selection of the specimens, nor were they tampered with by the defendants, and the finding seems to be sustained by the evidence.

In regard to the assays of the specimens and the faith of the complainant in the mine if the specimens fairly represented the ore therein, he testified:

"Q. Was the result of these assays satisfactory to you? A. They were.

"Q. They were such, were they not, that if you believed that that ore—that these specimens fairly represented the ore in that mine—you would still regard that as a good mine, would you not? A. I felt quite well satisfied.

"Q. That would be your feeling now, would it not? A. Yes, sir.

"Q. If you felt that it was honest? A. The assays I had made, made an average of two hundred and twenty-eight ounces per ton.

"Q. Did that include those high grade assays? A. All of them.

"Q. The three hundred and seventy-one and twenty-three hundred ounces? A. Yes, sir. And I consulted with some miners here, who told me that if the mine did have that—well, we had a perfect bonanza, and I was very much pleased with the result of the assays.

"Q. And you would still feel, notwithstanding everything else that has been said and done, if you were convinced ²⁹⁶ that the specimens you obtained represented an honest average of the

mine, you would still feel that it was a good mine, would you not? A. I would. I think it would pay well."

The evidence in this record fails to show that the complainant was imposed upon in the selection of the specimens, or that any fraud was practiced on him after they were selected. If, therefore, the specimens failed to represent an honest average of the mine, the complainant, and he alone, was to blame.

In *Farnsworth v. Duffner*, 142 U. S. 43, which was a bill for the rescission of a contract of purchase and to recover the money paid on the contract on the ground that it was entered into through false and fraudulent representations, in the decision of the case it was said: "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations." It is there, among other things, also said: "In *Ludington v. Renick*, 7 W. Va. 273, it was held that 'a party seeking the rescission of a contract on the ground of misrepresentation must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand and his attention drawn to them, relief will be denied.' In the case of *Atwood v. Small*, decided by the house of lords, and reported in 6 Clark & F. 232, 233, it was held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying ²⁹⁷ upon representations made to him: '1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such

examination and relied upon the evidences obtained by such examination, and not upon the representations."

What was said in the case cited applies here. The complainant, apparently not being satisfied with the representations of Crocker in regard to the mine, proceeded to see and investigate for himself; and after making a thorough examination he had, so far as appears, as much information in regard to the mine and its richness as the defendant, Crocker, and he doubtless relied upon the information obtained rather than upon representations which had been made before.

In view of all the facts, we do not think the evidence makes out a case which would authorize a court of equity to rescind the contract.

The judgment of the superior court will be reversed and the cause will be remanded, with directions to dismiss the bill.

FRAUD—FALSE REPRESENTATIONS—OPINIONS.—Mere expressions of belief or opinion as to the quality or value of articles sold, though false, cannot be made the basis of an action for deceit, in the absence of either fraud or warranty: *Handy v. Waldron*, 18 R. I. 567; 49 Am. St. Rep. 794; but in *Hedin v. Minneapolis Medical etc. Inst.*, 62 Minn. 146; 54 Am. St. Rep. 628, it was held that a false statement of opinion as to a subject on which one party has special knowledge while the other party is ignorant and relies thereon to his damage, if made fraudulently, renders the person giving the opinion liable in an action for deceit.

FRAUD—FALSE REPRESENTATION—MATERIAL FACT. An action for deceit can be maintained only when it is shown that a false representation of a material fact has been made with intent to deceive and in ignorance relied upon, and that damage has resulted therefrom: *Hedin v. Minneapolis Medical etc. Inst.*, 62 Minn. 146; 54 Am. St. Rep. 628, and note.

McNULTA v. CORN BELT BANK.

[164 ILLINOIS, 427.]

BANKS AND BANKING—SALARY OF OFFICERS.—The power of bank directors under a statute authorizing them to appoint necessary officers and fix their salaries, is confined to fixing a recompense or reward to be paid for performing such services as are appropriate to, and required by, their duties as officers, and does not include power to give a "bonus" in addition to salary.

BANKS AND BANKING—SALARY OF OFFICERS—BONUS. A sum fixed by the directors of a bank to be paid to their president, in addition to a named salary, for his "acceptance" of the office and the performance of acts outside of the duties thereof, is a bonus and not salary.

CORPORATIONS—INCREASE IN CAPITAL STOCK.—A corporation organized under a statute can increase its capital stock only in the mode prescribed by such statute.

CORPORATIONS—INCREASE OF STOCK.—An increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders, at a corporate meeting, and in the manner prescribed by law.

CORPORATIONS—INCREASE OF STOCK.—A resolution passed by the board of directors of a corporation cannot fix, in advance, the time for increasing the capital stock of the corporation, without reference to the action of the stockholders, or the method prescribed by statute.

CORPORATIONS — BY-LAWS — INCREASE AND TRANSFER OF STOCK.—A by-law of a corporation which seeks to keep the future action of the stockholders in reference to an increase of capital stock in subjection to the will of the directors who pass such by-law, and which also attempts to limit the right to sell or transfer stock by imposing unreasonable conditions, is illegal and void.

CORPORATIONS — LIMITATIONS ON TRANSFER OF STOCK.—The right of a stockholder in a corporation to sell and transfer his stock cannot be restrained by a by-law, making such sale or transfer subject to the consent of the directors, or refusing to permit such transfer unless the directors are satisfied.

CORPORATION—BONUS TO OFFICER, WHEN INVALID. A bonus agreed to be paid by directors of a corporation to their president in consideration of his contemplated action in carrying out unlawful provisions of a by-law, for the future increase of the capital stock, and for controlling the transfer thereof, is invalid and cannot be recovered.

CORPORATIONS—BONUS TO OFFICER—VALIDITY.—Directors of a corporation cannot vote a large bonus as compensation, in addition to salary, to one of their number as president, when he takes part in the proceedings, or his vote is essential to the adoption thereof.

CORPORATIONS—BONA FIDE STOCKHOLDERS—RATIFICATION OF UNAUTHORIZED ACT.—The same men sitting merely as temporary stockholders of a corporation to approve what they have just done as directors thereof, are not bona fide stockholders for the purpose of ratifying an unauthorized act of the directors.

CORPORATIONS.—UNAUTHORIZED ACTS OF DIRECTORS of a corporation can be ratified only by bona fide stockholders.

CORPORATION—BONA FIDE STOCKHOLDERS—RATIFICATION OF UNAUTHORIZED ACT.—Bona fide stockholders in a corporation, for the purpose of ratifying the unauthorized act of its directors, are such only as own stock fully paid in and dedicated to the business of the corporation.

CORPORATIONS—BONUS TO OFFICER—VALIDITY.—An agreement by the directors of a corporation to pay a bonus to their president for doing an act forbidden by statute, is void.

CORPORATIONS—RELEASE OF STOCKHOLDERS.—The directors of a corporation cannot release a stockholder from payment for his stock, nor make any arrangement with him by which the corporation, its creditors, or the state, shall lose any benefit from his subscription.

CORPORATIONS.—DEFENSE OF ULTRA VIRES is available to a corporation in an action to enforce the unexecuted part of a contract made by it.

CORPORATIONS—VOID CONTRACTS.—An executed corporate contract, not merely ultra vires, but also void as against public policy, cannot be enforced in favor of either party to it.

CONTRACTS—VALIDITY—RELIEF.—If parties concerned in an illegal contract are in pari delicto, neither can obtain any relief.

Assumpsit based on the following resolution adopted by the directors of a corporation.

“Whereas, John McNulta has been elected president of the Corn Belt Bank, and preliminary to his acceptance of said office and entering upon the duties of the same it is necessary to fix and agree upon compensation for his services as such president; therefore, be it

“Resolved, That it is understood and agreed that the compensation of John McNulta, as such president, shall be \$100.00 per year, payable in semi-annual installments, and as a further consideration for his acceptance thereof, an additional sum equal to two and one-half ($2\frac{1}{2}$) per cent on all stock to be issued, payable at the time fixed for such issues, that is to say, at least \$100,000.00 par value of the said stock is to be issued within one year after the opening of the said bank for business, and another additional \$100,000.00, making \$300,000 in all that is to be issued, including the first issue of \$100,000.00, within two years from that date. The said John McNulta, by his acceptance hereof, agrees to subscribe for and take at par value all of such stock, in lots of not more than \$50,000.00 each, within any one period of thirty days after the preceding lot has been fully disposed of, paying therefor in cash par value, with his own funds, whenever the board of directors shall find responsible persons agreeing to purchase the same from him at such a price as may be fixed by the board, not less than 105, and interest at seven per cent from the date of the issue of such stock, and to sell the same to the persons and in the amounts designated by the board, with only the restrictions in transfer in use at the time of the commencement of business, for the purchase and sale of which stock said John McNulta is also to have interest at the rate of seven (7) per cent per annum, and exchange on New York, on all sums so invested by him, the overplus arising from the sale of said stock by him to inure to the benefit of the bank, and be disposed of as the board of directors may see fit.”

Judgment for the defendant, and plaintiff appealed.

Rowell, Neville & Lindley, and Welty & Sterling, for the appellant.

J. E. Pollock, A. J. Barr, and Fifer & Barry, for the appellee.

⁴⁴¹ MAGRUDER, J. It is assigned as error that the trial court refused to hold as law certain propositions submitted by the plaintiff below, the appellant here. By the propositions so submitted, the court was asked to hold, as matter of law, "that the resolution declared on is a resolution to pay McNulta an amount equal to two and one-half per cent on all stock to be issued in addition to the \$100,000 past issued, and that the whole per cent was to be due upon the sum of \$200,000 at the end of two years, whether the stock was issued or not; that it was competent for the directors of the Corn Belt Bank to pass the resolution sued on at the date of its passage, and to bind the corporation by such passage; that at the meeting of December 2d the record of which is in evidence, it was competent to the bank directors to approve and adopt the resolution declared on, and with the assent of the stockholders to bind the corporation by the terms of the resolution; that the approval of the resolution sued on by the directors at their meeting of December 2d and the approval of the same by the stockholders at the same date, was not ultra vires."

The subject presented for consideration by the assignments of error, relates to the construction and validity or invalidity of the resolution referred to, which is set out in full in the statement of facts preceding this opinion.

The resolution provides for the payment of both a salary and a bonus. The salary of appellant as president of the board of directors, or his compensation for services as such president, was fixed at \$100 per year payable in semi-annual installments. Salary is a "reward or recompense for services performed, and is usually applied to the reward paid to a public officer for the performance of his official duties": 21 Am. & Eng. Ency. of Law, 443, note 3, and cases cited. The banking act of this state provides that the directors elected by the ⁴⁴² subscribers to the capital stock "may proceed to organize by the election of one of their number as president, and may appoint the necessary officers and employes and fix their salaries": Rev. Stat., c. 16 a, sec. 4; 3 Starr & Curtis' Annotated Statutes, 107. If this confers upon the board of directors the authority to fix the salary of their president, their power is confined to fixing a recompense or reward to be paid to him for performing such services or duties, as are appropriate to, and required by, his office as president. But the resolution provides that he should receive an "additional" sum, that is, a sum besides and beyond his salary, as a consideration for accepting the office of president, and that this additional sum should be equal to two and one-half per cent on

all stock to be issued. To pay a man for accepting an office is not to pay him for performing the duties of an office after it has been accepted. An amount equal to two and one-half per cent upon all stock to be issued would appear to be a very large consideration to be given for the mere act of accepting the office of president of the bank, if the words, "acceptance thereof," were understood in their ordinary meaning. But the second paragraph of the resolution shows that, by the acceptance of the office, appellant agreed to take all of the stock to be issued at a certain price, at a certain time and upon certain terms, and to sell the same in a certain way. What was to be done under the agreement involved in the acceptance of the office was not necessarily or appropriately embraced in the services or duties required of the president of a bank. Hence, the "additional sum" specified in the resolution is a bonus and not a salary.

It is very evident, that the resolution contemplated the payment of the bonus of two and one-half per cent upon the whole \$300,000 of stock, although it is so drawn that it can be construed either as providing for two and one-half per cent upon the \$300,000, or as providing for two and one-half per cent upon the \$200,000 to be issued ⁴⁴⁸ after the payment of the original capital stock. Certain it is that the appellant and those associated with him interpreted the resolution as applying to the original \$100,000 of capital stock, because the bonus of two and one-half per cent was paid upon the original capital stock, as appears from the statement of the facts herein. The resolution uses the words, "making \$300,000 in all that is to be issued," thus treating the original \$100,000 of stock as part of the stock to be issued, upon which the two and one-half per cent was to be calculated. The resolution was originally passed on November 21, 1891, and at that time the original \$100,000 had only been subscribed for, and not paid in, so that the words, "paying therefor in cash par value with his own funds whenever the board of directors shall find responsible persons agreeing to purchase the same," etc., would, upon that day, apply as well to the first \$100,000 as to the second \$200,000. The resolution was re-adopted on December 2, 1891, after the \$100,000 in currency had been counted by the auditor's representative. Considered as of the latter date, the resolution would only apply to the \$200,000 to be issued, because it does not stand to reason that there would be an agreement to subscribe for, and take at par value, and pay for in cash, stock which had already been subscribed for and taken and paid for.

Appellant contends that he was to have the bonus of two and one-half per cent upon all the stock, whether it was actually issued or not; that he was not to have a percentage upon the stock, but a sum equal to two and one-half per cent upon the stock which it was the purpose of the bank to issue in the future, in addition to the original capital stock; and that as the designation of a percentage of two and one-half per cent was merely a mode of expressing what sum total he was to have, it was immaterial whether the stock was issued or not. Whether the resolution is capable of this construction or not, it is not such a resolution as entitles the appellant to a recovery ⁴⁴⁴ in this case under the views hereinafter expressed. It is quite clear from the terms of the resolution that the additional sum, equal to a percentage on all stock to be issued, was only "payable at the time fixed for such issues"; and, as the times fixed for the issuance of increases in the stock could only be determined by the action of the bona fide stockholders when circumstances would justify such increases, that part of the resolution, which attempts to fix in advance the amount of the increase of the stock, and the time when such increase should take place, was invalid.

Section 2 of the banking act provides that the application to the auditor for permission to organize shall state the amount of capital. The application here stated the capital stock to be \$100,000, and while it also stated that there was a purpose to thereafter increase the capital stock to \$300,000, such statement of a mere purpose or intention had no effect in the matter of increasing the capital stock.

The banking act provides a mode in which the capital stock may be increased. By section 12 of that act, it is provided that, whenever the board of directors may desire to increase the capital stock, they may call a special meeting of the stockholders for the purpose of submitting to a vote of such stockholders the question of such increase of capital stock; that such meeting shall be called by giving to each stockholder either in person, or through the mail, a thirty days' notice, signed by a majority of the directors, stating the time, place, and object of the meeting, and also by publishing a general notice of such meeting for three successive weeks in a newspaper; that at such meeting, each stockholder shall have one vote for each share of stock held by him, and votes, representing two-thirds of all the stock, shall be necessary for the adoption of the proposed increase; that, at such special meeting, or at any regular meeting, the proposition for an increase may be submitted to a vote, ⁴⁴⁵ and, if it is carried by

such two-thirds vote, a certificate thereof, verified by the president's affidavit and under the corporate seal, shall be filed in the auditor's office, and in the office of the recorder of deeds of the county where the principal office of the bank is located; that upon the filing of such certificate, the change proposed and voted for as to such increase of stock shall be declared accomplished in accordance with such vote; and that the bank shall, upon filing such certificate, cause a notice of such "change of organization" to be published for three successive weeks in a newspaper in the county where its principal office is located: 3 Starr & Curtis' Annotated Statutes, 110, 111.

As the appellee was organized under the statute of this state, already referred to, it could only accomplish an increase of its capital stock in the mode prescribed by that statute. It is well established that a corporate body, having only a statutory existence, can only exercise its franchises and powers in the manner prescribed by the law under which it is organized: *Fridley v. Bowen*, 87 Ill. 151. An increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by the shareholders at a corporate meeting: 1 Cook on Stocks and Stockholders, sec. 285. It is, in the language of the statute, a "change of organization." Even where the charter of a corporation fails to state by whom the power to increase its capital stock is to be exercised, its board of directors have not, merely by virtue of their position as directors, the authority to increase the capital stock without the assent of the shareholders: *Eidman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90. The policy of a corporation is always under the control of a majority of its stockholders, and the lawful exercise of its franchise and business must be regulated and governed by a majority of its stockholders: *Wheeler v. Pullman Iron etc. Co.*, 143 Ill. 197. By the terms of the law under which appellee was organized, an increase of its capital stock ⁴⁴⁶ could only be effected by a vote representing two-thirds of all the stock. The question of the increase is required to be submitted to the vote of the stockholders. The submission of the question of the increase of the stock to their votes involves and implies the exercise on their part of their own free and independent judgment as to the policy and advisability of making such increase. It involves the right to determine, in their discretion, not only whether the stock should be increased, but when such increase is to be made. In accomplishing it, the mode prescribed by the law must be followed.

It is manifest, from what has been said, that a resolution pass-

ed by a board of directors, who are the mere agents and trustees of the stockholders, charged with the duty of faithfully managing their affairs, cannot fix in advance the time for increasing the capital stock of the corporation without reference to the action of the stockholders, or the methods prescribed by the statute. This is what the resolution here under consideration attempts to do by stating, that "at least \$100,000 par value of the stock is to be issued within one year after the opening of said bank for business, and another additional \$100,000, within two years from that date." In this respect the resolution was wholly invalid. Its attempt to keep the matter of increasing the stock under the control of the original board of directors is further manifest from the provision, which it makes for the sale of the stock to the persons and in the amounts designated by the board, "with only the restrictions in transfer in use at the time of the commencement of business." The restrictions thus referred to are contained in section 4 of article 6 of the by-laws. That section provides: "That all of the stock of this bank sold or transferred shall be with the express condition and understanding that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock of this bank from time to time, not exceeding \$50,000 ⁴⁴⁷ at any one time or within a period of sixty days, until its capital stock reaches \$300,000. . . . That the provisions of this article and the by-laws of this corporation shall become a part of every contract for the transfer of any stock of this bank, and shall operate as a reservation of a limited ownership of the stock transferred, to the extent of the provisions hereof, made binding on the transferee by the acceptance thereof."

This by-law is illegal and void, not only because it seeks to keep the future action of the stockholders in reference to the increase of the stock in subjection to the will of the original directors who passed the by-law, but also because it attempts to limit the right to sell or transfer stock by imposing unreasonable conditions. Shares of stock in a corporation are as transferable as any other kind of personal property; and all unreasonable attempts to restrain the right to transfer such shares are void as being against public policy: 1 Cook on Stocks and Stockholders, sec. 331. The right of a stockholder to sell and transfer his stock cannot be restrained by a by-law which makes such sale and transfer subject to the consent of the directors, or refuses to permit the same unless the directors are satisfied: 1 Cook on Stocks and Stockholders, sec. 332.

As the bonus to be paid to appellant was in consideration of his contemplated action in carrying out unlawful provisions for the future increase of the stock and unlawful provisions for controlling the transfer of the stock, he is not entitled to the recovery of such bonus.

This conclusion is further warranted by the fact that the resolution, which was passed for the benefit of the appellant, was the product of his own influence. It must be remembered that appellant owned nine-tenths of the stock, he having \$90,000 and the other stockholders only \$10,000. When the \$100,000 was brought over to the appellee bank from the First National Bank of Bloomington, and counted by the auditor as paid in upon the subscriptions to the capital stock, appellant was not ⁴⁴⁸ only held out to the auditor as a stockholder who had paid his subscription of \$90,000, but the other stockholders were represented as having paid their subscriptions of \$10,000. This sum of \$10,000, submitted temporarily to the inspection of the auditor, was not furnished by the stockholders, but by appellant for them. Appellant was president of the board of directors. The eleven directors were the eleven stockholders, so that whether there was a meeting of directors or a meeting of stockholders, appellant, as owner of nine-tenths of the stock, had the controlling interest and was the predominant influence. On December 2, 1891, when the board of directors met and readopted the resolution of November 21, 1891, fixing appellant's salary and giving him the bonus already mentioned, the minutes recite that all the members voted in favor of the resolution; and, of course, all the members included the appellant. On the same day, when the eleven stockholders met, all the stock was represented and all the members and shares voted to confirm the previous proceedings, including the passage of the resolution; and, of course, if the minutes are correct, appellant must have voted to approve the adoption of the resolution and by-laws, which conferred upon him such large compensation. The law is, that where a salary or compensation is voted to a director, the vote is illegal, if it is carried only by including the vote of the director who receives the pay or salary: 1 Cook on Stocks and Stockholders, sec. 657. Where the chief stockholder, who is president, induces the directors to vote a large salary to him, the corporation may defeat the officer's action at law to recover it: 1 Cook on Stocks and Stockholders, sec. 657; also, *Miner v. Belle Isle Ice Co.*, 93 Mich. 97. Directors cannot vote a salary, much less a large bonus or compensation, in addition to a salary, to one of their number, as president, when he

takes part in the proceeding, or his vote is essential to the adoption of the resolution: *Wickersham v. Crittenden*, 93 Cal. 17, and cases cited; *Gridley v. Lafayette etc. Ry. Co.*, 71 Ill. 200.

⁴⁴⁹ It is claimed that the resolution was ratified by a meeting of the stockholders. The meeting of the stockholders held on December 2, 1891, was composed of the same men, eleven in number, who constituted the board of directors, by whom the resolution was originally passed. The same men merely sat as stockholders to approve what they had just done as directors. They were not really bona fide stockholders. They paid nothing for their stock, as appellant merely obtained \$100,000 in currency, and put it in the bank for a few hours, until the auditor counted it; and it was thus made to appear that they were stockholders, whose stock had been fully paid for.

Section 5 of the banking act provides that "when the directors have organized . . . and the capital stock of such association shall have been all fully paid in and record of the same laid before the auditor, he shall . . . make a thorough examination into the affairs of such association, and if satisfied the authorized capital has been paid in, and that the association has the full amount dedicated to the business, . . . he shall give them a written or printed certificate under seal authorizing them to commence the business," etc: 3 Starr & Curtis' Annotated Statutes, 108. The stockholders who, under the statute, would have the power to ratify the previous acts of the directors done before the stock was paid for, were such bona fide stockholders as owned stock "all fully paid in" and "dedicated to the business" of the association. Here, however, there was no actual payment, as the money was withdrawn as soon as counted by the auditor. The association did not have the full amount of its capital stock dedicated to the business. Stockholders, claiming to be such by the means thus designated, were not bona fide stockholders: *Bates v. Great Western Tel. Co.* 134 Ill. 536; *Terwilliger v. Great Western Tel. Co.*, 59 Ill. 249. Consequently, their ratification amounted to nothing.

⁴⁵⁰ In addition to this, the unlawful character of the contract with appellant as embodied in the resolution appears upon the face of the resolution itself. By it appellant agrees to subscribe for, and take at par value, all the stock, and pay for it in cash par value with his own funds, not absolutely and unconditionally, but only when "the board of directors shall find responsible persons agreeing to purchase the same from him," etc. His own funds are to be at once replaced by money to be furnished by purchasers of

stock to be found by the directors. The resolution contemplates only the temporary use of moneys to be supplied by appellant for the purpose of taking the stock at its par value. Courts will construe a contract in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view: *Torrence v. Shedd*, 156 Ill. 194. So construing the present resolution, it contemplates the doing of that which was actually done, that is to say, the temporary supply of funds for the purpose of having them counted by the auditor, and thus illegally accomplishing an organization of the bank with authority to proceed to business, and to dispose of stock apparently paid up in full. The bonus or compensation, which appellant was to receive, was to be paid to him for doing that which was in direct contravention of the statute, because the statute requires the capital stock to be fully paid in and dedicated to the business of the association. The agreement embodied in the resolution is an agreement to do an act forbidden by the statute, and therefore is not binding: *Penn v. Bornman*, 102 Ill. 523; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97.

The effect of the resolution, and of what was done under it, was to release the original subscribers to the capital stock from the obligation to pay their subscriptions. When the \$100,000 was paid in, the subscriptions appeared to be thereby discharged, but when it was taken out nothing remained in the bank to show payments ⁴⁵¹ of the subscriptions. Until sales were made of the stock, the bank had no funds whatever, all pretended payments upon the subscriptions being withdrawn. "It has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state, shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*," but as unjust to the other stockholders, to the public and to the creditors of the company: *Burke v. Smith*, 16 Wall. 390; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29; *Osgood v. King*, 42 Iowa, 478.

It is claimed by counsel for appellant that, even if the contract embodied in the resolution is *ultra vires*, the appellee cannot avail itself of the defense of *ultra vires*, where the contract has been in good faith performed by the other party to it, and the corporation has had the benefit of the contract and of the performance.

It is true, as a general rule, that a corporation cannot avail itself of the defense of ultra vires, when a contract, not immoral in itself nor forbidden by any statute, has been in good faith fully performed by the other party, and the corporation has had the full benefit of its performance: *Kadish v. Garden City etc. Bldg. Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256. But while the rule is, that the executed dealings of a corporation under such a contract will be allowed to stand, yet the rule is otherwise where the contract ultra vires remains executory: *Thomas v. Railroad Co.*, 101 U. S. 71; *Kadish v. Garden City etc. Bldg. Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256. In the latter case, courts will oftentimes interfere to prevent its enforcement. Here, the object of the suit is to recover what is claimed to be due upon the unexecuted part of the contract. Appellant is suing to recover a bonus of two and one-half per cent upon \$150,000 of stock, which has never been issued, under a contract ⁴⁵² which is clearly ultra vires, so far as it attempts to control the increase of the capital stock in a manner not authorized by the statute. If this be regarded as a contract merely ultra vires, that is, a contract not within the power conferred upon the corporation by the act of its creation, the defense of ultra vires is here allowable, as the present action is brought to enforce the executory part of the contract: *Thomas v. Railroad Co.*, 101 U. S. 71. So far as the executed part of it is concerned, that is to say, so far as appellant has been paid his bonus upon the original issue of \$100,000 of the stock and upon the second issue of \$50,000, appellee cannot recover back the amounts thus already paid under the plea of setoff, if the contract be pleaded as merely ultra vires in the sense already stated.

But the resolution here sued upon, regarded as a contract between appellant and the appellee corporation, is a contract which is illegal in its character, and contemplates action which is forbidden by the statute. Such a contract is not merely ultra vires, but it is void as against public policy, and will not be enforced in favor of either party to it. Where parties concerned in illegal agreements are in *pari delicto*, the law will not aid either, but will leave them without remedy against each other: *Bishop v. American Preservers' Co.*, 157 Ill. 284; 48 Am. St. Rep. 317.

We are, therefore, of the opinion that appellant is not entitled to recover the bonus claimed by him upon the unissued stock, and that, under its plea of setoff, appellee is not entitled to recover back what has already been paid to appellant. It follows that there was no error in refusing to hold as law the propositions submitted by the appellant to the trial court.

The judgments of the appellate and circuit courts are affirmed.

CORPORATIONS—INCREASE OF CAPITAL STOCK.—For a fraudulent increase of its capital stock a corporation is answerable because such increase is the act of the corporation: *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545; 47 Am. St. Rep. 290, and note.

CORPORATIONS—RIGHT OF STOCKHOLDERS TO SELL STOCK.—Stockholders in a corporation, including its directors who own stock, have indisputable right to dispose of their stock at their pleasure: *Trisconi v. Winship*, 43 La. Ann. 45; 28 Am. St. Rep. 175, and note. See, also, the extended note to *Thompson v. Reno Sav. Bank*, 8 Am. St. Rep. 864.

CORPORATIONS—ULTRA VIRES AS A DEFENSE.—While an ultra vires contract made with a corporation remains executory neither party to it is estopped from asserting its invalidity: *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519; 24 Am. St. Rep. 931, and note; *Sherman etc. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note.

SHEA v. MURPHY.

[164 ILLINOIS, 614.]

DEEDS—MENTAL CAPACITY TO MAKE.—The fact that the mind of a grantor may have been somewhat impaired by age or disease does not justify a court in setting aside his deed. The deed is valid if the grantor has sufficient mental capacity to properly understand and comprehend its nature, character, and scope.

DEEDS.—UNDUE INFLUENCE to render a deed void, must be of a character to deprive the grantor of free agency.

DEEDS—DELIVERY AFTER DEATH.—If a grantor executed a deed and placed it in the hands of a third party to be held and delivered to the grantee after the grantor's death, reserving to himself no control over, nor right to recall or revoke it, these facts constitute a valid delivery.

JUDGMENTS—ERRONEOUS INSTRUCTIONS AS GROUND FOR REVERSAL.—A decree sustained by evidence cannot be reversed for erroneous instructions if the verdict is merely advisory.

DEEDS—EVIDENCE TO IMPEACH.—Statements made by a grantor are inadmissible in evidence to impeach his deed.

Bill to partition certain land and to set aside a deed thereto brought by plaintiffs, as heirs at law of Patrick Murphy, deceased, against Thomas Murphy, who held the land under a deed executed by Patrick Murphy in his lifetime. Decree dismissing the bill, and plaintiffs appealed.

E. J. Kelly, and Brewer & Strawn, for the appellants.

V. J. Duncan, T. F. Doyle, and W. A. Panneck, for the appellees.

618 CRAIG, J. While it is true that when the deeds were executed Patrick Murphy was advanced in years and was somewhat feeble in body, and perhaps his mind was not as bright and vigorous as it had been in former years, yet we do not find in the

record any satisfactory evidence that he was of unsound mind, or incapable of transacting business such as disposing of property by deeds of conveyance. It appears from the evidence that on the evening of October 11, 1893, he made up his mind to send for some person to prepare deeds. On the next morning, he sent the defendant Thomas Murphy to La Salle for one Haskins, an attorney, to prepare the papers. The attorney came and prepared the deeds as he was directed by Patrick Murphy. They were read over but not then executed. Haskins, in his testimony in regard to the mental capacity of Murphy, testified: "In my judgment his condition mentally was just as sound as any man I ever met." Two days after the deeds were written they were executed, and acknowledged before a justice of the peace. John Meara, who was present when the deeds were executed, testified: "I think Patrick Murphy understood the nature of the business he was engaged in at the time he signed the deeds." Andrew Whalen, a neighbor, testified that Murphy was able to transact ordinary business. A number of other witnesses corroborate the testimony of those we have referred to. Indeed, we find ⁶¹⁹ no evidence in the record which would justify the jury or the court to find that Patrick Murphy, at the time the deeds were executed, was of unsound mind or incapable of transacting the business of disposing of his property. The fact that the mind may have been somewhat impaired by age or disease will not justify a court in setting aside a contract or a deed. It is ordinarily enough that the contracting party has sufficient mental capacity to properly understand and comprehend the nature, character, and scope of the business which he undertakes to transact.

In regard to the charge in the bill of undue influence but little need be said. Undue influence, to render a deed void, must be of a character to deprive the grantor of free agency: 1 Redfield on Wills, 522; Dickie v. Carter, 42 Ill. 376; Yoe v. McCord, 74 Ill. 44; Brownfield v. Brownfield, 43 Ill. 153; Roe v. Taylor, 45 Ill. 491; Burt v. Quisenberry, 132 Ill. 399. Nothing of that kind appears here. When the deeds were written by the attorney, Thomas Murphy was not present, and no directions were given or suggestions made by him. Indeed, we find no evidence in the record that Thomas Murphy importuned his father to execute the deeds, or that the father was controlled by him or any other person. On the other hand, so far as appears, the execution of the deeds was the deliberate act of Patrick Murphy.

But it is claimed that the deeds were not delivered by Patrick Murphy, and hence they were invalid. Whether there was a de-

livery of the deeds depends upon what occurred at the time they were acknowledged, on the fourteenth day of October, 1893. After the deeds were written, two days before, Patrick Murphy informed Haskins, the attorney, that he did not intend to sign them that day. The question of delivery was, however, discussed. Haskins testified: "When we were talking about the signing of the deed, he commenced to ask me questions about what he would have to do with the deeds after they were signed. 620 I believe I said to him, first, that if the deeds were not signed and delivered in his lifetime to the parties to whom they were made, or to somebody for them, they would not be good. Then he asked me about it, and I explained to him that it was essential to the delivery of a deed that it be signed and delivered during the lifetime of the party—either to the parties named as grantees in the deed or somebody for them—and the persons to whom they were delivered, if not to the grantees, would have to have the absolute control over them and he would have to lose the right to recall the deeds—lose all further control over them. I explained that to him fully, and then he said when he signed the deeds he would deliver them to somebody—he didn't want to give them directly to the heirs. I suggested to him about making the deeds and reserving a life estate to himself, and then he could deliver them to the parties. He said no; that he wanted it as it was there; that suited him better; that he would deliver the deeds to somebody that would be all right, for the parties to whom the property was to go."

On the morning of October 14th—two days after Haskins had given directions in regard to the delivery of the deeds—Mrs. Meara had a conversation with Patrick Murphy and his son Thomas. She testified: "We were talking about sickness and dying, and I says to Mr. Murphy that I didn't think he was going to live very long and I didn't think he was going to die very soon, and I thought he never would get over it, and Mr. Murphy says, 'I have lived longer than anybody that belonged to me.' I don't know what else was said, and then Mr. Murphy says to Tom, he says, 'I will sign the deeds if you will promise to leave them in the hands of John Meara until after I die,' and Tom says, 'I don't care who has them,' then he says, 'Go for Hickok.'" After this conversation Murphy sent for his friend Meara, and he and the justice of the peace, Hickok, arrived at the same time. Hickok testified as follows: "I acknowledged these deeds October 621 14, 1893. He said he had been having some business done by a lawyer from La Salle, and he had to

watch the lawyers a little, and he wanted me to look the papers over. I read them to Mr. Murphy. He said, 'That is all right.' He undertook to sign them with a pen, but could not make much of a fist at it, and then he signed them by his mark. I acknowledged them and placed them on the table. John Meara came up to the table, and Murphy said, 'John, you take those papers and keep them until I am gone and give them to the ones they belong to.' Meara said, 'I will see that they are kept safely.' There was other evidence in corroboration of Hickok, but it will not be necessary to repeat it here. Meara took the deeds and retained them in his possession until the death of Patrick Murphy.

When the deeds were placed in the hands of Meara, Patrick Murphy, the grantor, reserved to himself no right to recall or revoke the deeds during his life. On the other hand, the entire dominion and control of the deeds passed into the hands of Meara, who held them for the grantees therein named. Where a grantor executes deed and places them in the hands of a third party to be held and delivered to the grantees, reserving no control whatever over the instruments, such facts constitute a valid delivery: *Baker v. Baker*, 159 Ill. 394; *Miller v. Meers*, 155 Ill. 284. In the *Baker* case, where the facts in regard to a delivery were similar to the facts here, we said: "In *Stone v. Duvall*, 77 Ill. 475, we held that the delivery of a deed for land to a third party, to be retained until the death of the grantor and then to be delivered to the grantee, is not an absolute delivery and will not operate to vest an immediate estate in the land, but it will be good to pass the title, at the grantor's death, to the grantee or his heirs. . . . In the case under consideration, the grantor passed the deeds into the possession and absolute control of Joseph (the son). The grantor retained no control whatever over them, but Joseph took and retained the entire control, and they never passed out of his possession until the death of the grantor, when he delivered them over to the respective grantees. Under the facts as they were proven we entertain no doubt in regard to the validity of the delivery of the deeds."

Counsel for appellants have criticised some of the instructions given for appellees. In a case of this character, where the verdict of the jury is merely advisory, if the decree rendered by the court is sustained by the evidence, as it is here, erroneous instructions would not be ground for reversing the decree.

Complaint is also made that the court erred in refusing to permit appellants to prove what Patrick Murphy said in reference

to his property. It is a familiar rule that statements made by a grantor are inadmissible for the purpose of invalidating a deed. When a person has executed a deed he cannot invalidate it by any parol declarations he may make: *Francis v. Wilkinson*, 147 Ill. 384; *Nicewander v. Nicewander*, 151 Ill. 156. As the offered evidence could have no bearing except to invalidate the deeds it was properly excluded.

The decree of the circuit court will be affirmed.

DEEDS—MENTAL CAPACITY.—In the absence of proof of undue influence, before an heir can set aside a deed made by his ancestor on the ground of his mental incapacity, the heir must prove such a degree of mental weakness on the part of the grantor as amounts to imbecility and renders him incapable of understanding and protecting his own interests: *Argo v. Coffin*, 142 Ill. 868; 34 Am. St. Rep. 86, and note.

DEEDS—UNDUE INFLUENCE.—A deed will not be invalidated on the ground of undue influence, unless the court is convinced that the grantor was not a free agent at the time it was executed: Note to *Argo v. Coffin*, 34 Am. St. Rep. 90.

DEEDS—DELIVERY AFTER DEATH.—A deed duly executed and recorded which "conveys and warrants" certain land, and then provides that it shall be of no effect until after the death of the grantor and then to be in full force, conveys a present interest in the land but postpones its enjoyment: *Wilson v. Carrico*, 140 Ind. 528; 49 Am. St. Rep. 213, and extended note.

MARTIN v. MARTIN.

[164 ILLINOIS, 640.]

VENDOR AND VENDEE—VENDOR'S LIEN—SUBROGATION.—A vendor's lien is personal to himself and not assignable, nor can a third party, by voluntarily paying the amount of the purchase money secured by such lien, acquire it by subrogation.

SUBROGATION—SURETY—VOLUNTEER.—If one advancing money to pay the debt of another occupies the place of a surety, or is compelled to pay the debt to protect his own rights, he is entitled, without any agreement to that effect, to be subrogated to the rights of the creditor, but a mere volunteer who so advances the money without any agreement is not so entitled, and his payment extinguishes the lien as well as the debt.

EQUITY—"HE WHO SEEKS EQUITY MUST DO EQUITY." Equity cannot require of a complainant, as a condition of relief to which he is otherwise entitled, the performance of conditions not warranted by settled principles of equity, but the maxim that he who seeks equity must do equity may be applied and conditions of relief imposed in favor of defendant in many cases where he could obtain no independent or affirmative relief.

CLOUD ON TITLE—REPAYMENT AS CONDITION OF RELIEF.—If a husband, after voluntarily conveying property to his wife, again conveys the same property in trust to secure money

advanced at his request to discharge an existing lien against the property, the deed of trust cannot be set aside as a cloud on the wife's title, unless the money so advanced is repaid.

R. D. Huszagh, for the appellant.

Flower, Smith & Musgrave, for the appellee.

641 CARTER, J. Appellant filed her bill in the circuit court of Cook county, against appellee and others, to remove as a cloud upon her title to certain real estate owned by her, a deed of trust given by her husband, Thomas J. Martin, to Patrick Hogan, as trustee, to secure five promissory notes for \$1,159.28 each, payable to his brother, Nicholas Martin, the appellee. The circuit court decreed the relief as prayed, but the appellate court reversed the decree and remanded the cause, with directions to require of appellant, as a condition of relief, the payment into court, for the benefit of appellee, of the amount of three promissory notes of \$1,050 each, and interest, which had been paid and taken up by appellee.

The facts necessary to an understanding of the case are briefly as follows: Appellee was a wholesale tea and coffee merchant, and Thomas J. Martin, husband of appellant, was in his employ as traveling salesman, at a salary of \$3,300, and later \$3,600, per annum. In April, 1885, Thomas Martin purchased of one Van Wyck the premises in question for the price of \$4,150, and having but a few hundred dollars in money, paid \$150 and procured from appellee \$850, and thus made the first payment of \$1,000 of the purchase money. Appellee charged up on his books to Thomas J. Martin the \$850 as so much advanced upon his salary. Van Wyck conveyed the premises to Thomas upon receipt of the \$1,000, and took from him his three promissory notes for \$1,050 each, payable in one, two, and three years, respectively, and a deed 642 of trust upon the premises securing their payment, and Thomas and his wife, the appellant, went into possession and occupied the premises as their homestead. The warranty deed from Van Wyck to Thomas Martin, and the deed of trust from the latter to the former, were duly recorded on May 21, 1885. On August 21, 1885, Thomas Martin, by warranty deed, conveyed the property to one Mahon, for the expressed consideration of \$4,500, but in fact without any consideration, and on the same day the said Mahon, by quitclaim deed, conveyed the property to appellant. Both of these deeds were also then duly recorded, and thereafter appellant paid the taxes and special assessments upon the property, occupied it with her husband and claimed to

own it. As the first two notes of Thomas Martin to Van Wyck matured they were paid by appellee and canceled, and the amount charged up on his books to Thomas, with his salary account. It seems the third or last note was not paid until in 1892, when Thomas promised his brother, the appellee, that upon its payment he would give him the same security upon the property that Van Wyck had. Appellee paid this last note and also took a release to Thomas of the Van Wyck trust deed, and retained the papers in his own possession. Although the title to the property had been vested in appellant for nearly seven years, and so appeared of record, appellee had no actual knowledge of that fact, but supposed it was still vested in his brother. Thomas drew his salary at irregular intervals, and at the end of each year the excess he had received as salary and as payments of his notes was carried forward, and interest charged upon it as so much due and unpaid from him to appellee. Appellee testified that he regarded these advancements as loans to his brother. When appellee paid the last note for his brother to Van Wyck, in April, 1892, upon casting up the account it was found that Thomas owed appellee \$5,796, whereupon appellee drew up five promissory notes, payable to himself, each.⁶⁴⁸ for one-fifth of this amount, and also a deed of trust to said Hogan, as trustee, securing the same, and they were duly executed by Thomas and delivered to appellee, who filed the trust deed for record. These notes were payable one each year for five years. Appellant did not know of this transaction at the time, and, so far as the evidence discloses, did not know of it until the fall of 1893, which was about the same time that appellee learned that she had a deed to the property. She testified also that she did not know until January, 1892, that the property had not been paid for, when appellee stated to her that nothing had been paid on the house.

It is not set up by cross-bill or insisted in the argument that appellee has any lien which he can enforce on the property, either by virtue of the trust deed sought to be removed as a cloud or by virtue of the Van Wyck claim which he discharged, but the contention is, that the case is such, from all of its facts and circumstances, as to call for the application of the maxim in equity that he who seeks equity must do equity; that before appellant can have the deed of trust given by her husband to Hogan, trustee, securing the debt to appellee, removed as a cloud upon her title, she must repay to appellee the moneys advanced by him in paying the three Van Wyck notes and removing that encumbrance from the property, and lawful interest thereon—and this contention

was sustained by the appellate court. It might seem at first blush that as appellant is proceeding against appellee to have his deed of trust given to secure the moneys, with others, which he had disbursed to pay off and discharge the Van Wyck lien, removed as a cloud upon her title, there would be no injustice in requiring her, as a condition of relief, to reimburse appellee for what he had expended in discharging the Van Wyck encumbrance. It is said, and with some show of reason, that she was benefited to this extent in having her property freed from this lien, and that it would impose no hardship upon her ⁶⁴⁴ to require her to pay this money as a condition to the removal of appellee's deed of trust given by her husband to secure it and other moneys advanced to him. It is not, however, nor can it be from the evidence, claimed that the deed of trust sought to be removed is any valid lien upon the property. Appellant did not sign it or know it was given, and Thomas Martin, when he gave it, had no interest in the property except as appellant's husband, having conveyed it nearly seven years before, and appellee was charged by the public records with knowledge of that fact. No fraud in the transfer to appellant by her husband is shown. He was not then in debt, except to Van Wyck for this unpaid purchase money—a debt for which appellee was in no way liable; and, from the manner of dealing between the two brothers, it seems to have been contemplated that the property should be paid for out of Thomas' salary. None of the payments, except the last, were made upon the strength of any promise of security by way of a lien upon the property. Appellee, however, besides advancing money with which to make the payments for the land as they became due, seems to have allowed his brother to draw more money than his salary amounted to, and was content to charge it up to him, with the accrued interest, from year to year. He advanced the \$850 to apply on the first payment, and paid the first two notes of \$1,050 each, without any promise of security whatever. Nor can it be said, from anything contained in the evidence, that appellant, who was the owner of the property, did or said anything to induce appellee to pay off the Van Wyck encumbrance, or to induce in him the belief that she would give, or join in giving, any security on the property whatever. She had not joined in the Van Wyck notes or deed of trust, nor had she, by the conveyance to her or otherwise, assumed their payment. Her husband had conveyed the property with covenants of warranty, and not as being subject to the mortgage, and it seems she did not in fact know of ⁶⁴⁵ the existence of the mortgage. He, alone, aside

from the lien upon the property, continued bound to pay the notes. He therefore, in paying them or in procuring them to be paid by appellee, was simply discharging his own debt, and the release of the property, so far at least as the first two notes were concerned, followed as a necessary consequence. In respect, therefore, to the payment of the first two notes in the absence of any fraud on the part of appellant or of any act or assurance by her upon which appellant might have relied, and in view of the fact that appellee paid these two notes as mere advancements upon his brother's salary or as personal loans, and without relying upon any supposed or promised lien upon the property, it is not easy to see how she can be charged with any duty to repay him before she can have her title cleared from the unauthorized encumbrance with which appellee has clouded it.

Appellee contends, however, that, having made the payments directly to Van Wyck, the vendor, he has an equity in the nature of a vendor's lien, which must be satisfied before appellant can have his trust deed removed as a cloud upon her title. Counsel for appellee say: "By means of these payments appellee satisfied the claim of the vendor, for which the vendor, even in the absence of any special agreement, would have had a lien upon the premises. Under such circumstances, the appellee is entitled to a lien in the nature of a vendor's lien—or, put differently, he is entitled to be subrogated to the rights of the vendor. A leading case in this state on the subject is *Austin v. Underwood*, 37 Ill. 438; 87 Am. Dec. 254. In that case it was held that where a third party pays directly to the vendor the purchase money of real estate, he is entitled to the lien the vendor would have had on the real estate for the purchase money if it had not been paid to him."

We do not think the cases cited (*Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254, and others) are in point. In the *Austin* case the question arose, in an action of ejectment between the parties to ⁶⁴⁶ the original transaction, as to whether the money paid by Austin was purchase money. Austin had paid the purchase money directly to the vendor, for and at the request of Underwood, the vendee, who received the conveyance as the consideration of the payment, and who, in pursuance of his promise, gave Austin a mortgage, and afterward a deed of trust, upon the property, but which did not contain a release of the homestead. At a foreclosure sale, Austin purchased the property and brought ejectment against Underwood, and the question was whether or not the debt for which the lien was given was pur-

chase money. If it was purchase money, there was, under the statute, no homestead exemption against it, otherwise Underwood's defense was good and he could not be ejected from his homestead. This court held that it was purchase money, and that, the mortgage lien having been given for the purchase money, there was, by the very terms of the statute, no homestead exemption as against it. The case did not at all involve the maxim invoked in the case at bar.

The lien which equity gives the vendor for the unpaid purchase money is personal to the vendor, and is not assignable: *Keith v. Horner*, 32 Ill. 524; *Elder v. Jones*, 85 Ill. 384; *Gruhn v. Richardson*, 128 Ill. 178; and if appellee had taken an assignment of the notes to himself, the only lien he could have enforced would have been the mortgage lien; and it would seem that if the doctrine of subrogation applies, its effect would be to subrogate him to the mortgage lien, for if he could not become the holder of the vendor's lien by assignment he could not by way of subrogation, which, to a great extent, rests upon the same principles: 28 Am. & Eng. Ency. of Law, 172; *Bishop v. O'Conner*, 69 Ill. 431. Appellee did not pay the purchase money, and thereby procure the conveyance of the land to the vendor, under a promise by the latter to secure him by a lien upon the property, as in *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571, but, in accordance with the distinction ⁶⁴⁷ there mentioned, he paid a pre-existing debt created for the purchase of the property: 19 Am. & Eng. Ency. of Law, 583. The property had been purchased and the title had passed, and afterward, when the debt became due, he paid it. He did not thereby acquire a vendor's lien upon the property.

In *Elder v. Jones*, 85 Ill. 384, Jones and wife purchased property from Elder and Wilson and caused it to be conveyed to Mrs. Jones, who gave her two notes for the purchase money and a mortgage on the property to secure their payment. One of the notes was paid by Jones, and upon his promise to one McLean to pay the other, and at the request of the vendors, McLean paid the other note and received it and the mortgage from the vendors. Afterward, Elder and Wilson, for the use of McLean, brought their bill to foreclose the mortgage, but it, having been executed by the wife alone, was declared invalid, and, the mortgage being invalid, the question, among others, arose, whether or not there was a vendor's lien upon the property securing the payment of the amount of the note as purchase money; but this court held that Elder and Wilson, having received the full amount of the

purchase money, had no further claim on the land therefor and had no interest in the suit—that McLean was the beneficial party, and the suit should have been in his name—but further said: “McLean cannot enforce a vendor’s lien which may have once existed in favor of Elder and Wilson. The law does not authorize the assignment or transfer of a vendor’s lien to the purchaser of the notes given for the purchase money. Such a lien is not assignable. It is personal, and can only be enforced by the vendor.”

We are referred to *Bennitt v. Wilmington etc. Min. Co.*, 119 Ill. 9, and other cases, as authorities in point sustaining the judgment of the appellate court, but we are unable to see that those cases are any more than remotely analogous to the case at bar. In the *Bennitt* case, the defendant, ⁶⁴⁸ *Bennitt*, as a judgment creditor but under a void judgment, redeemed the complainants’ property from a prior judicial sale, and at a sale made by virtue of such redemption purchased and obtained a certificate of purchase for the property, and upon a bill by the complainants to remove such certificate so obtained by sale under the void judgment as a cloud upon the title, it was held that as a condition of relief they should be required to pay *Bennitt* the amount of the redemption money, with interest. In that case, the time within which the complainants could redeem had expired, and while it was held they still had such an interest as to entitle them to sue, yet it is seen that they availed themselves of the redemption made by *Bennitt*, who had no intention of voluntarily paying the judgment debtors’ debt and redeeming it from the lien, but intended and endeavored to substitute his own lien and become himself the owner of the property by the purchase, and it was held, before they could have the cloud thus created removed in equity, they must do equity, and pay to *Bennitt* the redemption money and interest.

It would seem clear that as to all payments made by appellee, except the last, there is no principle of law or equity by which the moneys thus paid can be held to be a lien upon the land, or by which their payment can be held to have been made under such facts and circumstances as to impose on appellant any duty to reimburse appellee before she can have her title cleared of the cloud created by the trust deed. At the time of the payment of the last note, there was no lien on the property except to secure said last note, the balance of the debt having been extinguished four years before. Appellee was not a surety bound for the payment of the debt, nor did he have any interest in or title to the

property to protect, and, so far as the owner of the property was concerned, he was, at least as to all except the last payment, a mere volunteer. It is only where the one advancing the money occupies the place of a surety or is ⁶⁴⁹ compelled to pay the debt to protect his own rights, that courts of equity will, as a matter of course and without any agreement to that effect, subrogate him to the rights of the creditor whose debt he has paid. Where such conditions do not exist and there is no agreement that he shall have the benefit of the lien, his payment extinguishes the debt, and, of course, the lien as well: *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773.

But, as we view the case, appellee's rights arising from the payment of the last note, because of the agreement with the debtor, which induced the payment, that he should have the same security as had Van Wyck, the mortgagee, stand upon a different footing. This payment, and the cancellation of the indebtedness and release of the mortgage, were induced by this promise. If Thomas had then been the owner of the property, and had refused to carry out his promise it could not be doubted that, in equity, the debt evidenced by this last note, and the mortgage securing it, would have been treated as still alive in the hands of appellee, and its payment would have been enforced for his benefit by foreclosure. True, he had seven years before made a gift of the property to appellant, his wife, and they both occupied it; but, the conveyance to her having been a voluntary one, he was under no obligation to her to clear the property from encumbrance, and her property rights were not injured or interfered with in any way by the substitution of appellee for Van Wyck as the holder of the mortgage, in accordance with the agreement between the debtor, her grantor, and appellee. Whether, after having taken the new deed of trust for that and other indebtedness of Thomas to him, and in view of all the evidence, he could, as the moving party, enforce the Van Wyck mortgage in his own favor it is not necessary to determine; but when appellant seeks to have that deed of trust removed as a cloud upon her title, we are of the opinion that, by well-established principles of equity jurisprudence, ⁶⁵⁰ she may be required, as a condition of relief, to pay for appellee's benefit the amount of the last note paid by him, and lawful interest thereon. While the maxim that he who seeks equity must do equity does not invest courts of equity with mere arbitrary discretion to require of the complainant, as a condition of relief to which he is otherwise entitled, the performance of conditions not warranted by settled

principles of equity jurisprudence (*Finch v. Finch*, 10 Ohio St. 501), still, the maxim will be applied and conditions of relief imposed in favor of the defendant in many cases where he could obtain no independent or affirmative relief: 1 Pomeroy's Equity Jurisprudence, 1st ed., 422. It is not, however, meant by anything here said that appellee might not, in a proper case, have affirmative relief to the extent mentioned.

For authorities upon the doctrine of conventional subrogation (from the principles of which, in view of the evidence, the equities of appellee in this case must be deduced) reference may be had to 24 Am. & Eng. Ency. of Law, 290-296, and cases there cited; *Sheldon on Subrogation*, secs. 247, 248; *White v. Cannon*, 125 Ill. 412. See, also, *Milholland v. Tiffany*, 64 Md. 455; *Flannery v. Utley* (Ky., March 3, 1887); 3 S. W. Rep. 412; *Haggerty v. McCanna*, 25 N. J. Eq. 48.

The judgment of the appellate court and the decree of the circuit court are reversed and the cause is remanded to the circuit court, with directions that appellant take leave, if she shall be so advised, to amend her bill by tendering to appellee the money paid by him for or in discharge of the last Van Wyck note, with five per cent interest thereon from and after such payment, and that she be required to pay the same into court for his benefit, and that, upon so doing, a final decree be entered in accordance with the prayer of the bill; but in case appellant shall fail or refuse so to do, let the order be that her bill be dismissed at her costs.

Reversed and remanded.

VENDOR'S LIEN—ASSIGNMENT—SUBROGATION.—One person cannot acquire a lien upon land purchased by another by the unauthorized payment of the purchase money, nor can he, by simply paying the debt due the vendor, be subrogated to the latter's lien therefor: *Demeter v. Wilcox*, 115 Mo. 634; 37 Am. St. Rep. 422; but see on this subject, *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566, and note.

SUBROGATION — WHO ENTITLED TO — VOLUNTEERS. — A surety who pays the debt of his principal is entitled to be subrogated to the rights of the creditor as against his principal and cosurety: *Peebles v. Gay*, 115 N. C. 38; 44 Am. St. Rep. 429, and note; but a mere volunteer, who, without any duty moral or otherwise, pays the debt of another, is not entitled to subrogation: *Campbell v. Foster Home Assn.*, 163 Pa. St. 609; 43 Am. St. Rep. 818, and note.

MAXIMS—Applications of the maxim "he who seeks equity must do equity": *Werner v. Tuch*, 127 N. Y. 217; 24 Am. St. Rep. 443; *Sparks v. Ball*, 91 Ky. 502; 34 Am. St. Rep. 236; *Yard v. Pacific etc. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467.

INDUSTRIAL BANK v. BOWES.

[165 ILLINOIS, 70.]

BILL OF EXCHANGE, PRESENTMENT OF TO CHARGE DRAWER.—A bill of exchange must be presented to the drawee within a reasonable time, and, if payment is refused, notice must be promptly given to the drawer. Otherwise he cannot be held liable thereon.

BILLS OF EXCHANGE, WHAT ESSENTIAL TO.—To a bill of exchange there are three parties—drawer, drawee, and payee. The drawee is not bound until acceptance, and then, having become an acceptor, he is regarded as primarily the promisor, and the drawer is liable collaterally only.

BANKING.—A CHECK IS a draft or order upon a bank or banking-house purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand.

BILL OF EXCHANGE, WHAT IS NOT.—A paper drawn by a person on a bank or upon a person acting as the banker of the drawer, and which directs such person or bank to pay a sum certified to be due by an architect's certificate, is not a bill of exchange, but a check.

BANKING, CHECK, DRAWER, WHEN NOT RELEASED. A drawer of a check is not released from liability to the payee by the failure of the latter to present the check for payment and to give notice of nonpayment, unless the drawer has suffered some loss or injury thereby.

Action by the Industrial Bank of Chicago against Edwin J. Bowes, Jr., and others. The defendants while engaged in the construction of a building received a certificate from their architect stating that the builder, the Empire Building Company, was entitled to five hundred dollars by the terms of the contract. On the back of the certificate the following indorsements were written:

“Peabody, Houghteling & Co:

Pay to the order of Empire Building Company.

JOHN R. BOWES.”

“Pay to the order of Industrial Bank.

EMPIRE BUILDING CO.

C. C. McARTHUR, Treas.”

The order was presented to the drawee at various times, but was not paid, and finally payment was refused on the ground of want of moneys of the drawer with which to make payment, but no notice was given to him of such presentment nor of the nonpayment of the order.

Jones & Strong, for the appellant.

Woolfolk & Browning, for the appellees.

⁷³ CRAIG, J. It was conceded on the trial that John R. Bowes was authorized to sign for E. J. Bowes, Jr. & Bros., and that his signature represented the firm.

⁷³ The certificate of the architect set out in the statement shows that on June 17, 1892, there was due to the Empire Building Company, the contractor, from Bowes Brothers, the defendants, five hundred dollars. Peabody, Houghteling & Co. had made Bowes Brothers a building loan, and the money was drawn, from time to time, on architect's certificates, as needed, to pay for the construction of a building. On the back of the certificate of the architect issued June 17, 1892, for five hundred dollars, Bowes Brothers wrote the following:

"Peabody, Houghteling & Co.:

"Pay to the order of the Empire Building Company.

"JOHN R. BOWES."

This certificate was subsequently indorsed to the Industrial Bank by the Empire Building Company, and the bank failing to collect the money named in the certificate, brought this action against Bowes Brothers on the writing they had executed on the back of the certificate of the architect. The bank recovered a judgment in the superior court for the amount claimed to be due, but in the appellate court the judgment was reversed, on the ground that the instrument sued upon was a bill of exchange, and plaintiff could not recover, for the reason it had failed to notify Bowes Brothers at once of the refusal of Peabody, Houghteling & Co. to pay upon the presentation of the order.

The law is well settled that a bill of exchange must be presented to the drawee within a reasonable time, and, where payment is refused, notice must be given promptly to the drawer, otherwise he cannot be held liable: *Montelius v. Charles*, 76 Ill. 303; *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Story on Promissory Notes*, sec. 492. But was the instrument sued on strictly a bill of exchange, so that it should be governed by the rules of law applicable to such instruments? To a bill of exchange there are three parties—drawer, drawee, and payee. The drawee is not bound until acceptance, and then, having become the acceptor, he is regarded as primarily the ⁷⁴ promisor and as the drawer only collaterally, and the drawer is therefore liable in very much the same way as the indorser of a note: 1 *Parsons on Contracts*, 250. In *Story on Promissory Notes*, section 4, in pointing out the distinction between bills of exchange and promissory notes, the author says: "In a bill of exchange

there are ordinarily three original parties—the drawer, the payee, and the drawee, who, after acceptance, becomes the acceptor. In a bill of exchange the acceptor is the primary debtor, in the contemplation of law, to the payee, and the drawer is but collaterally liable.” The author also says: “The indorser of a note stands in the same relation to the subsequent parties as the drawer of a bill, and the maker of the note is under the same liabilities as the acceptor of a bill.” In the forms of bills of exchange given by Chitty in his work on Bills it will be found the time of payment is always specified, and on page 170, while the author admits that the omission to state the time of payment would not render the bill invalid, he says: “It is advisable in all cases to express the time of payment as clearly and intelligently as possible, and it is therefore usual to write it in words.”

As a general rule, it is understood that a bill of exchange will be accepted by the drawee, hence it is drawn payable on sight, or in thirty, sixty, or ninety days, and when presented to the drawee it is accepted, and from that time he becomes bound to pay. The instrument in question contains no time of payment, nor is there anything to indicate, from the reading thereof, that it was ever intended to be accepted by the drawee, as is usually the case with a bill of exchange. While it has some of the characteristics of a bill of exchange, we do not regard it as such. On the other hand, it has all the elements of a check, and we think it clearly falls within the definition given in the text-books of a check. In 2 Daniel on Negotiable Instruments, 528, the author says: “A check is a draft or order upon a bank or banking house, ⁷⁵ purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand.” In 2 Parsons on Notes and Bills, page 57, the author says: “A check is a brief draft or order upon a bank or banking house, directing it to pay a certain sum of money.” These definitions of a check were quoted and approved by this court in *Ridgely Nat. Bank v. Patton*, 109 Ill. 479. Here, Peabody, Houghteling & Co. was not a regular bank, but the firm was the banker of Bowes Brothers and was so treated and recognized, and, so far as the check in question is concerned, the firm will be regarded as a bank. The instrument in question was, then, a draft or order upon a banking house directing it to pay a certain sum of money, and, as declared by Parsons, a check; or it was a draft or order upon a banking house, purporting to be drawn upon a deposit of funds, for the payment, at all events, of a certain sum of money to a person or order, and

payable instantly on demand—which Daniel declares to be a check. Under either definition the instrument in question was a check.

The instrument being a check, did the Industrial Bank lose its right to recover from the drawers of the check, for the reason the bank failed to present it for payment within proper time, and failed to give notice to the drawer of the refusal of Peabody, Houghteling & Co. to make payment? The general rule is, that the holder, in order to charge the drawer in case of dishonor, is bound to present the check for payment within a reasonable time and give notice to the drawer within a like reasonable time, otherwise the delay will be at his own peril. Story on Promissory Notes, section 493, lays down the rule that if the payee or holder of the check receives it from the drawer in the same town or city where it is payable, he is bound to present it for payment on the next succeeding day after it is received; but where he receives the check from the drawer in a place distant ⁷⁶ from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next day after it is received, and the person to whom it is sent will not be required to present it for payment until the next day after it has reached him in the regular course of mail. But the rule just spoken of only applies where, in the intermediate time between the drawing of the check and presentment, there has been a change of circumstances affecting the interests of the drawer in respect to the banker upon whom the check was drawn. Where there has been a change the rule is applied strictly. But Story on Promissory Notes, section 497, says: "The drawer is in no case discharged from his responsibility to pay the same unless he has suffered some loss or injury by the omission or neglect to make such presentment, and then only pro tanto. If the bank has failed or become bankrupt, he will be discharged to the extent of the loss he has sustained thereby." This court has laid down the same rule. Thus, in *Heartt v. Rhodes*, 66 Ill. 351, 354, it is said: "The want of due presentment or notice of the dishonor of a check does not discharge the drawer, unless he has suffered some loss or injury thereby. This is one point of difference between a check and a bill of exchange." And in *Stevens v. Park*, 73 Ill. 387, it was held that by failing to give notice to the drawer of a check of its nonpayment within a reasonable time, the holder assumes the burden of showing that no damage has accrued to the drawer. In speaking further on this subject, Story (Story on Promissory Notes, sec. 498) says: "If the bank or banker still remains in good credit and is able to

pay the check, the drawer will still remain liable to pay the same, notwithstanding many months may have elapsed since the date of the check, and before the presentment for payment and notice of the dishonor. So if the drawer, at the date of the check or at the time of the presentment of it for payment, had no funds in the bank or banker's hands, or if, after drawing the check and before its presentment for payment and dishonor, he had withdrawn his funds, the drawer would remain liable to pay the check notwithstanding the lapse of time."

Under the law as laid down in the authorities cited, it is plain the drawers of the check, Bowes Brothers, are liable for the amount thereof. From the facts as found by the appellate court it appears the check was presented to the bankers upon whom it was drawn on the date it was issued, and again on the next business day thereafter, and again a week later, which was the last of June, 1892. It was again presented July 17th, and also two weeks after that date, when payment was refused because the bankers, Peabody, Houghteling & Co., had paid all the money out belonging to the drawers of the check. From the facts as found there was no improper delay in presenting the check for payment. The drawers of the check were not notified until August 4, 1892, that payment was refused, but the delay will not bar a recovery here. The bankers upon whom the check was drawn did not fail nor were they financially embarrassed. The drawers, therefore, sustained no loss which could defeat a recovery. Indeed, the fund in the hands of Peabody, Houghteling & Co., placed there by the drawers of the check for its payment, was drawn out in subsequent checks which they issued to other parties. The drawers themselves were thus guilty of a manifest wrong in withdrawing the funds which they had placed in the hands of the banker for the purpose of paying the check in question, and it would now be an act of great injustice to allow them to defeat judgment on the check, as their wrongful act prevented payment by the bankers on whom it was drawn.

Under the facts as found by the appellate court we are of opinion the bank was entitled to judgment. The judgment of the appellate court will therefore be reversed and the judgment of the superior court of Cook county will be affirmed.

BILLS OF EXCHANGE—PRESENTMENT.—The holder of a bill of exchange must present it in reasonable time to the party on whom it is drawn at his place of business: *Mason v. Donsay*, 85 Ill. 424; 85 Am. Dec. 368; note to *Adams v. Darby*, 75 Am. Dec. 118.

BILLS OF EXCHANGE—ACCEPTANCE.—One radical difference between a check and a bill of exchange is, that the former need not be accepted, while the latter must, in order to fix the liability on the drawee: *Simmons Hardware Co. v. Bank*, 41 S. C. 177; 44 Am. St. Rep. 700, and note.

CHECKS—WHAT ARE.—A check is an order to pay a sum of money to the holder on the presentation of the check or demand of the money: *Minot v. Russ*, 156 Mass. 458; 32 Am. St. Rep. 472, and note. See, also, the note to *Simmons Hardware Co. v. Bank*, 44 Am. St. Rep. 708.

CHECKS—RELEASE OF DRAWER.—If a check is not presented within a reasonable time, and the bank fails, the payee must suffer the loss if the drawer has moneys on deposit sufficient to pay it: *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458; 49 Am. St. Rep. 45, and note; *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note.

AMERICAN EXCHANGE BANK v. LORETTA MINING CO.

[165 ILLINOIS, 108.]

BANKS, DUTY OF TO TRANSMIT MONEY.—A bank receiving a draft to be credited to the account of another bank, but for the use of a person designated, is charged with the duty of transmitting the moneys as directed or of holding them for the benefit of the person so designated.

BANKING—SPECIAL DEPOSIT, WHAT IS.—If a draft is sent to one bank for the credit of another for the use of a person designated, a special deposit is thereby created in his favor, and the bank receiving the draft must retain its proceeds until they are drawn out by the other bank for the use of the person for whose benefit the deposit was made. The receiving bank cannot credit the draft to the other bank on the debt of the latter, and thus relieve itself from liability.

A BANK RECEIVING MONEY FOR TRANSMISSION TO ANOTHER BANK is liable to the person depositing such moneys for the amount thereof, if, before they are transmitted and before the bank to which they are to be sent receives notice of them, it suspends business, and never afterward resumes.

ONE BANK HAVING A RIGHT OF SETOFF AGAINST ANOTHER cannot exercise it as against an account of the other as trustee for a third person.

BANKING—APPROPRIATION OF MONEYS WHEN NOT EFFECTED BY BOOK-KEEPING.—If a bank, on being advised by telegram by A that a deposit has been made in another bank for the use of B, credits the latter with the sum named in the telegram, and charges it to the bank with which the deposit is claimed to have been made, such entries are provisional merely, and do not bind the bank to pay B's check until it receives notice from the bank wherein the deposit was claimed to have been made that it had accepted the deposit. In the absence of such notice, the moneys must be regarded as remaining with the bank where they were originally deposited, and the title thereto does not vest in the other bank nor in its receiver on its suspending business before receiving such notice.

BANKING—DEPOSITOR'S RIGHT TO RECOVER HIS DEPOSIT AFTER INSOLVENCY.—Where a deposit has been kept separate and not fully received before formal insolvency, the de-

positor may claim it, and money received upon collections subsequent to the formal insolvency belongs to the owner of the paper, and can be recovered in full, if it can be traced to the particular paper.

RATIFICATION—WANT OF REPUDIATION OF AGENT'S ACTION.—If an agent presents a claim against an insolvent bank for money credited to him, but to which his principal is entitled, the latter cannot be held to have ratified its agent's act because of a neglect to repudiate it, if the claim was presented without the knowledge or consent of the principal.

Assumpsit by Loretta Gold & Silver Mining Company against the American Exchange National Bank to recover seven hundred and fifty dollars deposited by the plaintiff with the defendant on the twenty-first day of July, 1893. At that time the plaintiff forwarded to the defendant by mail a letter inclosing a draft "for credit of account of Merchants' National Bank, Great Falls, Montana, for the use of M. J. Dunn, superintendent," of plaintiff, and on the same day telegraphed its superintendent of the making of such deposit, and also the Montana bank that the deposit had been made to the superintendent's credit. He had an account with the Montana bank in his own name, in which he kept, without the knowledge or consent of the plaintiff, moneys belonging to it. On receipt of the telegram, the Montana bank credited Dunn and charged the defendant with the sums named. The defendant did not forward the proceeds of the draft, but merely credited the amount thereof upon an account owing to it by the Montana bank. The latter bank suspended business before receiving any notice from the defendant of the making of the deposit. Judgment in favor of the plaintiff, and the defendant appealed.

Swift, Campbell, Jones & Martin, for the appellant.

Defrees, Brace & Ritter, for the appellee.

¹⁰⁰ **MAGRUDER, C. J.** Appellee sent to appellant a draft for seven hundred and fifty dollars, saying: "Enclosed please find draft for seven hundred and fifty dollars for credit of account Merchants' National Bank, Great Falls, Montana, for the use of M. J. Dunn, our superintendent at Barker, Montana." The letter inclosing the draft notified appellant, that the money did not belong to the Montana bank, but that such money belonged to appellee, or to Dunn, its superintendent in Montana. The appellant, at the time it received the money, was the correspondent at Chicago of the Montana bank, and the latter bank kept an account current with appellant. When the appellant took the money of appellee into its hands, it became charged with the duty

of transmitting it to the Montana bank for the use and benefit of appellee's superintendent, or of holding it subject to the order of the Montana bank acting in the interest and for the benefit of appellee. This duty it was under obligations to perform in strict accordance with its instructions: *Judy v. Farmers' etc. Bank*, 81 Mo. 404; *United States Bank v. Macalester*, ¹¹⁰ 9 Pa. St. 475; *Parker v. Hartley*, 91 Pa. St. 465; *Bank of British North America v. Cooper*, 137 U. S. 473; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431. The deposit made by appellee with appellant was a special deposit for a designated beneficiary, and could not be used or dedicated by appellant to any other purpose. Appellant having become the special depository of the fund was bound to retain it until it was drawn out by the Montana bank for the use of appellee's superintendent: *Sutler v. American etc. Bank*, 113 N. Y. 593.

Instead of transmitting the fund to the Montana bank for appellee's use, or holding it subject to be drawn out by that bank for appellee's use, appellant, on the very day on which it received the fund, credited it, upon its books, generally to the account of the Montana bank, and, the Montana bank being indebted to it in more than the amount of the fund, the appellant subsequently refused to pay over the fund to appellee upon demand being made for it. Appellant thus applied a fund belonging to appellee to the payment of its own debt against the Montana bank. This it had no right to do, because the letter, transmitting the fund to appellant, informed appellant that the money belonged to appellee, and was merely to be credited to the Montana bank for the use of appellee. By accepting the fund under the terms named in the letter, appellant became the depository of the fund for appellee's use, and took the money with notice that it was charged with such use: *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646.

The fund was sent by appellee from Milwaukee to appellant at Chicago on July 21, 1893, and was received by appellant at Chicago on July 22, 1893. On the latter day, appellant mailed a postal card to the Montana bank, informing that bank that appellant had received the fund and had credited it to the account of the Montana bank. But the Montana bank suspended business at the close ¹¹¹ of business hours on July 23, 1893, and never afterward resumed business; on the morning of the next day, July 24th, it was seized by the national bank examiner, pursuant to orders from the comptroller of the currency, and subsequently went into the hands of a receiver. It did not receive the

postal, advising it of the credit of this fund to it by appellant, until after its failure. By the failure of the Montana bank, the purpose, for which the deposit was made, failed and could not be executed. It thereby became impossible for the Montana bank to receive the money in trust for the use of appellee, and for the appellant to transmit it to that bank for the use of appellee, or to hold it subject to the order or draft of that bank for appellee's use. It results that, inasmuch as the purpose of the deposit of the fund with appellant has become incapable of execution, appellant holds the fund to the use of appellee, and has become liable to repay it to appellee: *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646; *Cutler v. American etc. Bank*, 113 N. Y. 593.

It is contended, however, that the entries by the Montana bank of a credit to Dunn, and of a charge against the appellant, for the amount of the fund after the Montana bank received notice on July 21, 1893, of the deposit of the money to Dunn's account in the appellant bank, made the Montana bank the owner of the credit given by appellant to that bank, and, therefore, that the Montana bank alone is entitled to sue appellant. The credit given by appellant was not to the Montana bank, but to that bank as trustee for the use of appellee or its superintendent. A deposit due to the Montana bank as trustee for the use of appellee could not be offset against the Montana bank's private debt to appellant (1 Morse on Banks and Banking, sec. 334), and, hence, the case must be looked at as though appellant was not a creditor of the Montana bank. As appellant had no right to pay its claim against the Montana bank with this fund which belonged to appellee, the fund is to be regarded as still ¹¹² in the hands of appellant, unused and unappropriated. The question then is, whether the receiver of the Montana bank has the right to sue for the fund, or whether such right belongs to appellee.

It is to be noted that the Montana bank merely gave Dunn a credit for seven hundred and fifty dollars and charged appellant with seven hundred and fifty dollars, but it never paid any money to Dunn on account of such credit, and Dunn drew no checks against the same. The credit to Dunn and the corresponding debit to appellant upon the books of the Montana bank were merely provisional entries, and did not bind that bank to pay any checks against the fund before receiving notice from appellant that it had accepted the deposit made by appellee. As it did not receive that notice before its failure, it would have had the right at any time before such failure to cancel the credit to Dunn. The title to the fund did not pass to the Montana bank by virtue of these provisional entries made by itself upon its own books in ad-

vance of receiving from appellant any remittance of the fund, or any notice from appellant of its acceptance of the deposit, and in advance of any payments made to appellee or its superintendent on account of the fund. No such force or effect can be given to book-keeping entries, which are regarded as being merely conditional, and which the bank is not precluded from canceling prior to the actual collection or receipt of the money indicated by them: *Armstrong v. National Bank of Boyertown*, 90 Ky. 431; *Cutler v. American etc. Bank*, 113 N. Y. 593; *Commercial Nat. Bank v. Hamilton Nat. Bank*, 42 Fed. Rep. 880.

If appellant had remitted the money to the Montana bank instead of sending notice by mail of the deposit and credit, such remittance would not have reached the Montana bank until after its failure, and, in such case, it would not have gone into the general assets of the insolvent bank, but would have been held as a special fund subject to the right of appellee to reclaim it specifically ¹¹⁸ from the hands of the receiver. Appellee should not be placed in any worse position, because appellant retained the fund and paid its own debt with it and sent a letter of advice, than if appellant had forwarded the money and it had not reached its destination until after the failure of the Montana bank. Where a general deposit is made before formal insolvency, there can be no recovery in preference to other creditors, but where the deposit has been kept separate and not fully received before formal insolvency, the depositor may claim it; and money received upon collections subsequently to formal insolvency belongs to the owner of the paper, and can be recovered in full if it can be traced to the particular paper: 2 *Morse on Banks and Banking*, 3d ed., secs. 589, 629, 631.

It is quite true, as announced in authorities referred to by counsel for appellant, that where a customer makes a deposit in a bank, in the ordinary course of business, of a draft or check received and credited as money, and indorsed by the customer to the bank "for deposit" to be placed to his credit, the title to the draft or check vests in the bank, subject to the right on the part of the bank to charge it back to the depositor in case it is not paid on presentment: 2 *Morse on Banks and Banking*, sec. 574; *American etc. Bank v. Manufacturing Co.*, 150 Ill. 336. But in such case there is an actual transfer of the title to the draft or check by indorsement upon the instrument itself. Here, however, there was nothing but a dispatch from appellee at Milwaukee to the bank in Montana, that a credit had been given to appellee's superintendent in the appellant bank at Chicago. This

dispatch, and the credit given to appellee's superintendent by the Montana bank upon its books, could hardly operate as a transfer of the fund in appellant's hands in Chicago to the Montana bank in the same way as a check or draft, indorsed for deposit in a bank and credited to the depositor, becomes the property of the bank. There ¹¹⁴ is nothing to show that appellant had any notice or information of appellee's dispatch to the Montana bank, or of the latter's credit to Dunn, or of the arrangement between appellee and the Montana bank for the making of such credit. By the terms of the credit, the Montana bank in its individual capacity was not entitled to the fund, but it was only entitled to it as trustee for the use of Dunn; and what took place between appellee and the Montana bank could not change appellant's obligation to hold the fund for the account of the Montana bank to the use of Dunn into an obligation to hold it for the Montana bank without reference to Dunn's interest, in the absence of any notice, on the part of appellant, of such arrangement. Hence, appellant still holds the fund upon the same terms and conditions upon which it originally received it.

If the Montana bank was indebted to appellant, and appellant will lose its debt by the surrender of this fund, it cannot be said that appellee is in any way responsible for the loss. If appellant is obliged to refund the money, it is in no worse condition than if the deposit had never been made. It would certainly be most inequitable to permit appellee to lose the fund altogether through an application of it to the payment of appellant's debt. As the money belonged to appellee, and was placed in appellant's hands to be held for the use of appellee, there can be no equity in using it to pay a debt to appellant from the Montana bank, growing out of prior transactions between the Montana bank and the appellant, with which appellee had no connection whatever.

The ordinary relation between banker and depositor is that of debtor and creditor, and has nothing of the nature of a trust in it: *Bank of the Republic v. Millard*, 10 Wall. 152; 2 *Morse on Banks and Banking*, 3d ed., sec. 289; *Brahm v. Adkins*, 77 Ill. 263. When appellee deposited the fund with appellant under the terms contained in the letter of July 21, 1893, appellant, by accepting the deposit, ¹¹⁵ became a debtor not to the Montana bank, but to the Montana bank for the use of appellee's superintendent. When the Montana bank gave appellee's superintendent credit for seven hundred and fifty dollars, it was not debtor to such superintendent by virtue of any money actually deposited with it; it had received no money either from appellee or its

superintendent; it had merely given a credit in the expectation that, at some time in the future, it would receive or draw for the fund in appellant's hands. If the Montana bank had actually paid out money to the amount of the credit to appellee or its superintendent upon checks drawn against such credit, then the claim of the Montana bank to the fund now in appellant's hands would rest upon a valid consideration, to-wit, the money previously advanced upon the checks so drawn; but, as no checks were ever drawn against the credit, and no money was ever paid out on account thereof to appellee or its superintendent, the claim of the Montana bank or its receiver to the fund now in appellant's hands would have no valid consideration to rest upon. To sustain the claim of the Montana bank to this fund would be to give something for nothing; it would be to give that bank appellee's money in exchange for a mere book entry which appellee never made use of and never realized a dollar upon. A decision which would lead to such a result would be most inequitable, and is not demanded by the necessity of enforcing any inexorable rule of law.

It seems that, on September 11, 1893, Dunn filed a claim for moneys due him from the Montana bank, including the amount of the credit so given him, with the receiver of the bank, and that the claim has been allowed. It is insisted that appellee has ratified the proving of this claim by Dunn, because it has neglected to repudiate Dunn's action. Nothing is shown to have been paid upon the claim, and it was filed and proved without the knowledge, consent, or authority of appellee. Appellee's rights cannot be prejudiced in the manner claimed by the action ¹¹⁶ of Dunn. Nor will the rights of appellant be prejudiced thereby, in case judgment goes against it in favor of appellee for the amount of the fund now in its hands; because, on payment of the judgment, the allowance of the claim can be set aside, or appellant can be subrogated thereto to the amount of the judgment here.

We are not inclined to change the judgment of the appellate court so far as it fails to include interest upon the amount in controversy. Without passing upon the question whether interest should or should not have been allowed, we deem it sufficient to say that, when the motion to enter judgment with interest, made some time after the judgment without interest, had been entered, was denied by the appellate court, no exception was taken to its action in so denying the motion.

The judgment of the appellate court is affirmed.

BANKS—INSOLVENCY—RECOVERY OF SPECIAL DEPOSIT. A special depositor in a savings bank, whose deposit draws interest, is, in the event of the insolvency of the institution, entitled to be paid in full before any distribution is made to regular and ordinary depositors who are stockholders of the institution: *Heironimus v. Sweeney*, 83 Md. 146; 55 Am. St. Rep. 333, and note.

BANKS—SPECIAL DEPOSIT—WHAT IS.—When money of any description is deposited in bank and the identical gold or silver or bank-bills deposited are to be returned to the depositor, the deposit is special: *Mutual Acc. Assn. v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302.

STONE v. KELLOGG.

[165 ILLINOIS, 192.]

CORPORATIONS.—THE RECORDS AND BOOKS OF A CORPORATION ITS STOCKHOLDERS HAVE, at common law, the right to examine at reasonable times. This right is in many of the states subject to statutory regulations.

CORPORATIONS.—A STOCKHOLDER'S RIGHT TO EXAMINE THE BOOKS AND PAPERS of a corporation is absolute, except that it shall not be exercised from idle curiosity or for improper or unlawful purposes, under a statute of the state making it the duty of the directors of every corporation to keep correct books of account and of its business, and declaring that every stockholder shall have the right, at all reasonable times, by himself or his attorney, to examine the records and books of the corporation. Their custodian cannot question the motives and purposes of the stockholder in making the examination, and, if the right of examination is refused on the ground that its object is improper, the custodian must assume the burden of proving it to be so.

CORPORATIONS—STOCKHOLDER'S RIGHT TO INSPECT BOOKS.—An answer to an application by a stockholder for a writ of mandate to compel the submission of the books and papers of the corporation to his inspection, averring that the petitioner has been refused permission to examine any records and accounts which he was lawfully entitled to examine, is argumentative and insufficient. He is legitimately entitled to know everything of which the records, books, and papers of the corporation would inform him.

CORPORATIONS.—A STOCKHOLDER HAS THE RIGHT TO INSPECT THE BOOKS AND OTHER PAPERS of a corporation under a statute giving him at all reasonable times the right to examine the records and books of account of the corporation.

CORPORATIONS—STOCKHOLDER'S RIGHT TO EXAMINE BOOKS AND PAPERS.—An answer to a petition for a writ of mandate to compel the officers of a corporation to permit a stockholder and director thereof to examine such books and papers, which avers that the purpose of the petitioner is to discover some possible ground of attack upon the corporation and its management contrary to the interests of the company and for the private advantage of the petitioner, does not show any sufficient reason for not issuing the writ, but the courts have power to prevent any abuse by the petitioner of the right which he enjoys by virtue of his relation to the corporation.

Application by Milo G. Kellogg for a writ of mandate compelling the president and secretary of the Central Union Tele-

graph Company, a corporation, to permit him to examine its records, papers, and books of account. The petitioner was the owner of seven hundred and sixty-one shares of the capital stock of the corporation, and had ever since its organization been one of its directors. He had at various times made demand on the proper officers for permission to inspect the books of the corporation and also certain papers, among which were included contracts alleged to have been entered into between the American Bell Telephone Company and the Central Union Telephone Company. The refusal to allow the inspection was based upon the ground that the petitioner had taken certain proceedings which the officers of the corporation deemed inimical to its interests, that it was his duty to apply to the board of directors to obtain permission from them, and that the examination was sought to further his private interests and to enable him to make some attack upon the corporation. A demurrer to the answer was sustained, and judgment entered against the defendants directing a writ to issue, "commanding them, and each of them, forthwith to admit the complainant to the office of the said Central Union Telephone Company, and to give him full access to all books of account and records of said company, including herein the books of the executive committee of the board of directors thereof, and to all the contracts entered into by the said company with the American Bell Telephone Company, or by either of said companies, through any agent, officer, or servant thereof with the other, and that such admittance and access be permitted from day to day during business hours, and in such a manner as not to interrupt the business of the corporation, to the complainant, until the same shall have been completed."

Williams, Holt & Wheeler, for the appellants.

Charles H. Aldrich, for the appellee.

203 CARTER J. The question whether or not appellee is entitled to a writ of mandamus to compel appellants, as officers of the Central Union Telephone Company, to permit him to examine the records, books, and papers of the corporation, is presented by demurrer to appellants' answer to the petition. Appellee is both a stockholder and a director in the company. As a stockholder, owning more than seventy-five thousand dollars, at its face value, of the capital stock, he had large interests to protect, and as a director he had important duties to perform. In both capacities he had the undoubted right to inform himself

(and, if necessary, by examination of the records, books, and papers of the company at reasonable and proper times) as to the affairs and condition of the company, for the better protection of his own interests and the performance of his duties. The petition was amply sufficient, and unless it can be said that the answer showed sufficient reason for refusing ²⁰⁴ the writ, the judgments of the courts below granting it must be affirmed.

At common law, the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation: 1 Cook on Stocks and Stockholders, sec. 511; Alabama etc. R. R. Co. v. Rowley, 9 Fla. 508; Queen v. Maraguita Min. Co., 1 El. & E. 289; King v. Taylor Co., 2 Barn. & Adol. 115; In re Burton etc. Co., 31 L. J. Q. B. 62; King v. Wilts etc. Nav. Co., 3 Ad. & E. 477; King v. Clear, 4 Barn. & C., 899; Queen v. Grand Canal, L. R. 1 Ir. 337; Birm. Bristol Co. v. White, 12 B. 282; Mutter v. Eastern etc. Ry. Co., 38 Ch. Div. 92; Commonwealth v. Phoenix Iron Co., 105 Pa. St. 111; 51 Am. Rep. 184; Phoenix Iron Co. v. Commonwealth, 113 Pa. St. 563; Angell and Ames on Corporations, sec. 681; Redfield on Railways, 227; Grant on Corporations, 311; 2 Phillips on Evidence. 313; Martin v. Bienville Oil Works, 28 La. Ann. 204; Foster v. White, 86 Ala. 467; Winter v. Baldwin, 89 Ala. 483; State v. St. Louis etc. R. R. Co., 29 Mo. App. 301; State v. Bergenthal, 72 Wis. 314; State v. Sportsman's Park Assn., 29 Mo. App. 326. But the writ of mandamus would not issue, as a matter of course, to enforce a mere naked right or to gratify mere idle curiosity, but it was necessary for the petitioner to "show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination is desired": High on Extraordinary Legal Remedies, sec. 310; 2 Spelling on Extraordinary Relief, sec. 1612. But owing to the great increase in the number of stock corporations and the volume of business transacted by them, this right of inspection of the corporate books by the individual stockholder became so important that many of the states of the Union have made specific provision by statute for its enforcement. Section 13 of chapter 32 of the Revised Statutes of this state is as follows: "It shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state correct books of account of all its business, and every stockholder in such corporation shall have the right, at all reasonable times, by himself or by his attorney, ²⁰⁵ to examine the records and books of account of the corporation."

In *Foster v. White*, 86 Ala. 467, it was held that a similar provision of the statutes of Alabama was not merely declaratory of the common law, but that "the statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right, and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers, by furnishing mode and opportunity to ascertain, establish, and maintain their rights and to intelligently perform their corporate duties. . . . The only express limitation is, that the right shall be exercised at reasonable and proper times. The implied limitation is, that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is, the legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed": See, also, *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392; *Swift v. State* (Del.) June 15, 1896; 6 Atl. Rep. 856.

²⁰⁶ This interpretation of the statute of Alabama made by the supreme court of that state is, we think, a correct one, and is as liberal to the officers and agents of the corporation having the custody of its books, or to the majority of the stockholders or directors under whose orders they may act, as would be permissible to give to our own statute. Measured by the rule of law thus declared, appellants' answer was clearly insufficient. The statement therein that appellee had not been refused permission to examine any of the records and accounts which he was lawfully entitled to examine either as a stockholder or director is a mere argumentative denial of the allegations contained in the petition,

and is obnoxious to the demurrer as interposed. It cannot be tolerated that a stockholder can be denied the exercise of so valuable a right given to him in express terms by the statute, by those who are the mere agents of the stockholders, upon the plea, as in effect set up in the answer in this case, that the petitioner had not been denied any information to be derived from an examination of the books and papers which he was legitimately entitled to know. As a director and stockholder, he was legitimately entitled to know anything and everything of which the records, books, and papers of the company would inform him, so far as anything in the answer shows to the contrary: *People v. Throop*, 12 Wend. 185.

There was no sufficient allegation in the answer from which it can be made to appear, upon the admission made by the demurrer, that the object and purpose of the petitioner were not legitimate or were to injure the corporation. It is no sufficient answer to such a petition to impugn the motives of the petitioner. In his petition he states: "That it has been, is now, and will be his course of conduct to pursue his course with a view to secure the honest and economical administration of the affairs of this company, and that he has no other purpose in view, and has no desire to publish the result of his investigation ²⁰⁷ to the courts or to the public in any way, and is willing to submit to any reasonable restrictions, consistent with the due and adequate protection of his own interests, which the court may think it has power to impose, and to give any reasonable security to abide by such restriction, reserving to himself only the right, in the event that it becomes necessary in his judgment so to do, to seek such relief as he may be advised the law affords to protect his interest in said company, which embraces a large portion of his fortune." We agree with the appellate court that the courts are not without power to prevent an abuse of the rights which the petitioner enjoys by virtue of his relation to the company: 4 Thompson on Corporations, secs. 4406-4425.

The objection that the right to examine the records and books of the company does not embrace the right to examine the contracts and other papers mentioned in the pleadings we regard as without force.

Finding no error the judgment of the appellate court will be affirmed.

CORPORATIONS—RIGHT OF STOCKHOLDERS TO INSPECT BOOKS AND RECORDS.—Stockholders in a corporation have a right to inspect and examine its books at any reasonable time, and

a denial of this right by the corporation in a proper case exposes it to an action either of mandamus or for damages: *Legendre v. New Orleans Brewing Assn.*, 45 La. Ann. 669; 40 Am. St. Rep. 243, and note. A stockholder's right to make abstracts and memoranda of documents, books, and papers is as full and complete as is his right to an inspection thereof: *Swift v. Richardson*, 7 Houst. 338; 40 Am. St. Rep. 127, and note.

CHICAGO v. SEBEN.

[165 ILLINOIS, 871.]

PRACTICE.—A MOTION TO STRIKE OUT PLAINTIFF'S TESTIMONY on the ground of variance between it and the complaint is properly denied, unless the moving party points out the variance, and shows in what it consists.

MUNICIPAL CORPORATIONS ARE NOT LIABLE IN DAMAGES FOR THE MANNER in which they exercise, in good faith, their discretionary powers of a public, legislative, or quasi-judicial character, but are liable to actions for damages where their duties cease to be judicial in their nature and become ministerial.

OFFICIAL ACTION, WHEN JUDICIAL AND WHEN MINISTERIAL.—Official action is judicial when it is the result of judgment or discretion. Official duty is ministerial when it is absolute, certain, and imperative, involving the mere execution of a set task, and when the law which imposes it prescribes the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.

MUNICIPAL CORPORATION, LIABILITY OF FOR SYSTEMS OF SEWERAGE AND DRAINAGE.—The adoption of a general plan of sewerage involves the performance of a duty of a quasi-judicial character, but the construction and regulation of sewers, and the keeping them in repair after the adoption of such general plan, are ministerial duties, and a municipality which constructs and owns such sewers is liable for the negligent performance of such duties.

MUNICIPAL CORPORATIONS.—FOR NOT KEEPING STREETS AND SEWERS IN REPAIR after they have been constructed, a city is answerable to a person injured thereby, where, as in Illinois, the jurisdiction and control of streets and their improvement are conferred upon municipal governments. The rule is otherwise as to counties and as to towns which do not act under charters.

EVIDENCE—EXPERT.—A witness may be permitted to testify as an expert, when shown to be qualified by experience, that if an opening in a sewer inlet or catch-basin is more than a foot wide, it is practicable to put an iron grating over it.

Action by the appellee, Seben, against the city of Chicago to recover damages claimed to have been suffered by him from stepping into a sewer inlet at the corner of Blue Island avenue and Polk street during a dark night. At the request of the city the court instructed the jury that the defendant could not be held liable if the injury was the result of a condition of the sewer inlet, which condition was a part of the general plan of sewerage adopted by the city, unless it failed to use reasonable care in de-

termining upon and adopting that plan or condition, and unless the plan is such as to be necessarily dangerous, and that the city in adopting a system of sewerage was bound only to exercise reasonable care. Among the instructions asked by the city, but refused by the court were the following: "1. The court instructs the jury, as a matter of law, that the defendant is not liable for any injury to the plaintiff caused by the sewer entrance complained of in this case, where said sewer entrance was constructed in accordance with a plan devised, through no error in judgment and no lack of care and skill, and under the direction of the municipal authorities, and that the jury shall find the defendant not guilty if they believe that the sewer inlet in controversy was so constructed; 2. The court instructs the jury that the defendant is not liable in this case for constructing the sewer complained of, if the sewer was constructed in accordance with a general plan not in itself intrinsically dangerous, under the direction of the municipal authorities; and that the jury are to find the defendant not guilty if they believe the sewer inlet was so constructed." Judgment for the plaintiff, and the defendant appealed.

Roy O. West, Benjamin F. Richolson, and Worth E. Caylor, for the appellant.

McCracken & Cross, for the appellee.

376 MAGRUDER, C. J. Two defenses are relied upon by the city. The first is, that there is a variance between the allegations of the declaration and the proof, in that the declaration alleges that the plaintiff stumbled and fell into a catch-basin, and the proof offered shows that the plaintiff was injured by stepping into a sewer inlet situated several feet from the catch-basin. The second defense is, that the sewer inlet in question was constructed in accordance with a general plan devised through no error in judgment under the direction of the municipal authorities.

1. As to the variance. It is true that the second count of the declaration charges that the defendant permitted a certain catch-basin below the intersection of said streets to remain open and uncovered, and that it did not place guards or barriers around the same, nor lights so as to give warning and protect passers-by, and that plaintiff fell into said catch-basin. But the first count alleges that the defendant permitted "a deep and dangerous hole over and into a certain catch-basin below said streets to remain open and uncovered." Proof that the defendant fell into a hole is not at variance with the allegation that he fell into a "hole

over and into a certain catch-basin"; the hole was really a sewer inlet, designed to carry the water off into the catch-basin.

³⁷⁷ But if there was a variance in the respect thus indicated between the declaration and the proof, the question of such variance is not properly raised and preserved in the record. At the conclusion of the plaintiff's evidence, counsel for defendant moved to strike out the plaintiff's testimony on the ground of variance between the declaration and the proof, but the motion did not point out what the variance was, or in what it consisted. Where the defendant moves to strike out plaintiff's evidence on the ground of variance, it is incumbent on him to point out in what the variance consists, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to amend his declaration, so as to make it conform to the proof, and to avoid defeat upon a point not involving the merits of the claim: *Libby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191; *Lake Shore etc. Ry. Co. v. Ward*, 135 Ill. 511. In addition to this, there is evidence tending to support the allegation of the declaration, that the hole was over and into a catch-basin; and, therefore, the question of variance upon the plaintiff's whole proof was one of fact, which has been decided against appellant. "The question presented, as to whether the negligence proved differs from that in the declaration, is also a question of fact, where there is any evidence tending to support the declaration": *Harris v. Shebek*, 151 Ill. 287. For the reasons thus stated, we think there is no force in the objection, that there was a variance between the declaration and the proof.

2. As to the construction of the sewer inlet in accordance with the general plan. The question sought to be raised upon this branch of the case arises out of the refusal of the court to give the refused instructions of the defendant, which are set out in the statement preceding this opinion. It is well settled that municipal corporations have certain powers which are discretionary or judicial in character, and certain powers which are ministerial. The powers of such corporations have also ³⁷⁸ been divided into those which embrace governmental duties, such as are delegated to the municipality by the legislature, and in the exercise of which the municipality is an agent of the state; and those powers which embrace quasi private or corporate duties, exercised for the advantage of the municipal locality and its inhabitants. Municipal corporations will not be held liable in damages for the manner in which they exercise, in good faith, their discretionary powers of a public, or legislative, or quasi

judicial character. But they are liable to actions for damages when their duties cease to be judicial in their nature, and become ministerial: 2 Dillon on Municipal Corporations, secs. 832, 949; Tiedeman on Municipal Corporations, sec. 324. Official action is judicial where it is the result of judgment or discretion. Official duty is ministerial, when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion: *People v. Bartels*, 138 Ill. 322. A corporation acts judicially, or exercises discretion, when it selects and adopts a plan in the making of public improvements, such as constructing sewers or drains; but as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner: 2 Dillon on Municipal Corporations, sec. 1048, note 1. A municipal corporation acting in good faith is not liable for any error of judgment in constructing a system of drainage: 2 Dillon on Municipal Corporations, sec. 1046, and note; 15 Am. & Eng. Ency. of Law, 1148-1150. In *Springfield v. Le Claire*, 49 Ill. 476, we said: "Admitting that the power to construct sewers is discretionary as to the time of its exercise, yet, when exercised, it must be in such a manner as not to expose others to injury; a corporation, like individuals, is required to exercise its rights and powers, and with such precautions, as shall not subject other to injury."

379 It has been said that the work of constructing gutters, drains, and sewers is ministerial, and that the corporation is responsible in civil actions for damages caused by the careless or unskillful manner of performing the work: 2 Dillon on Municipal Corporations, sec. 1049. It is the duty of a municipal corporation, which exercises its power of building sewers, to keep such sewers in good repair, and such duty is not discretionary but purely ministerial: 1 Shearman and Redfield on Negligence, sec. 287; 2 Dillon on Municipal Corporations, sec. 1049. The adoption of a general plan of sewerage involves the performance of a duty of a quasi judicial character, but the construction and regulation of sewers and the keeping of them in repair, after the adoption of such general plan, are ministerial duties, and the municipality, which constructs and owns such sewers, is liable for the negligent performance of such duties: 1 Beach on Public Corporations, sec. 766; *Johnston v. District of Columbia*, 118 U. S. 19; *Seifert v. Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664.

By the terms of the city and village act, which has been adopt-

ed by the city of Chicago, the city council in cities has power to lay out, to establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same; to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels, and drains, and erecting gaslights; to construct and keep in repair culverts, drains, sewers, and cesspools, and to regulate the use thereof: Rev. Stat. 1874, c. 24, art. 5, sec. 63. The city, being thus required by law not only to construct but to keep in repair its culverts, drains, sewers, and cesspools, is liable in damages for a neglect to perform said duties. It has always been the doctrine of this court that while the legal obligation of the city to construct gutters and grade and pave streets is one voluntarily assumed, yet that when the city constructs these improvements for the benefit of the public, it then ³⁸⁰ becomes the duty of the city to see that they are kept in repair: *Alton v. Hope*, 68 Ill. 167; *Chicago v. Gallagher*, 44 Ill. 295; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Joliet v. Verley*, 35 Ill. 58; 85 Am. Dec. 342; *Roberts v. Chicago*, 26 Ill. 249; *Bloomington v. Bay*, 42 Ill. 503; *Lacon v. Page*, 48 Ill. 499; *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345.

Counsel for the appellant invoke the doctrine, which seems to prevail in the state of Michigan, that while complaint is made that the original plan of a city improvement is so devised as to render the work dangerous when completed, the fault found is with legislative action, and that a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself; that the wisdom and propriety of local legislative action cannot be made a judicial question; that it is and must be a political question, and can arise only between the legislator and his local constituency. The Michigan doctrine is announced in the two cases of *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507; and *Lansing v. Toolan*, 37 Mich. 152. It is to be remembered, however, that, in Michigan, a city is not liable for failure to keep its streets and sidewalks in repair, and that, in that state, the duty of keeping them in repair is a duty to the public, not to private individuals, and the mere neglect of such duty is a nonfeasance only; and that no action arises for an injury resulting from such neglect; no distinction being there held to exist between the liability of cities, and that of towns and counties: *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450; *Detroit v. Osborne*, 135 U. S. 492; 1 Beach on Public Corporations, sec. 759. Such a

doctrine, however, does not prevail, where, as in this state, the jurisdiction and control over the streets and their improvements are conferred upon the municipal government, so that there follows the obligation to keep the streets and sidewalks free from obstructions, and in a reasonably safe condition: *Hinds v. Marshall*, 22 Mo. App. 208; 2 Dillon ³⁸¹ on Municipal Corporations, sec. 1046, note 1; 2 Thompson on Negligence, 736. Moreover, in *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652, this court referred to and refused to follow the decisions of the supreme court of Michigan upon this subject, and, in referring to the case of *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450, spoke with approval of the dissenting opinion of Mr. Justice Cooley in that case. A distinction is taken, in the text-books and in many of the cases, between the liability of purely municipal corporations, such as cities and chartered towns and villages, and the nonliability of counties and towns as political divisions of the state; such towns and counties being held to be exempt from liability, while chartered cities and villages are held to be subject to such liability: 1 Beach on Public Corporations, sec. 757; Tiedeman on Municipal Corporations, sec. 339. This distinction was recognized by this court in the recent case of *Nagle v. Wakey*, 161 Ill. 387, where it was said: "The courts draw a distinction between the town and the municipal corporation proper, on the question of liability, in favor of the town." The distinction is furthermore referred to and recognized in the following cases: *Browning v. Springfield*, 17 Ill. 143; 63 Am. Dec. 345; *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652; *White v. County of Bond*, 58 Ill. 297; 11 Am. Rep. 65; *Symonds v. Clay County*, 71 Ill. 355. The reason for the distinction, as given by this court in the cases above referred to, is, that cities and chartered towns and villages act under charters, by which valuable privileges are conferred upon them at their request, these privileges being held to be a consideration for the duties, imposed upon them; and for the performance of these duties like individuals, they must be responsible in an action: *White v. County of Bond*, 58 Ill. 297; 11 Am. Rep. 65. Such organizations are the result of the action of the people, impelled thereto by considerations affecting, more or less, their private interest, while counties and towns do not become so at the special request of the people. Such counties and towns are "involuntary quasi corporations, being political ³⁸² or civil divisions of the state created by general laws to aid in the general administration of the government": *Symonds v. Clay County*, 71 Ill. 355. Cities

are regarded as corporations created for their own benefit, while the inhabitants of a district invested by statute, in invitum, with particular powers, are made corporations without their consent: *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652.

The rule of exemption, growing out of the discretionary powers with which cities are invested in the matter of arranging plans for the prosecution of public improvements, and where they act under the advice of skilled and experienced persons, is carried too far in the Michigan cases referred to; the rule should not be construed, so as to relieve "the city from liability when the plan devised, if put in operation, leaves the city's streets in a dangerous condition for public use": Tiedeman on Municipal Corporations, sec. 350. Legislative authority only relieves municipal corporations, which make public improvements, from responsibility for the necessary and usual results of a proper exercise of the powers conferred upon them: 15 Am. & Eng. Ency. of Law, 1154. But the necessary and usual results of the proper exercise of such powers do not include such negligent and unskillful performance of the work as exposes travelers upon the public streets to unusual dangers: *North Vernon v. Voegler*, 103 Ind. 314. In the case at bar, the declaration does not charge that the plan of the public improvement was defective, but it charges that the city neglected to keep the crossing of the two streets, named in the declaration, in good repair. If there was any evidence as to the plan adopted by the city for the construction of the sewer inlet to the catch-basin, it was included in a specification for the material and the construction of sewers introduced by appellant, which contained the following provision, to wit: "The contractor shall leave an inlet to the basin, on the side next to the curb, under the cover, to receive the water from the gutters, eight inches wide and twelve ³⁸³ inches deep." If the sewer inlet had been constructed in accordance with the plan, it would have been only eight inches wide and twelve inches deep; but the proof tends to show that it was about two and a half feet wide, and two and a half feet deep, and three feet long. The tendency of the proof was to show that, whatever the size of the hole had been originally under the plan of the city, it had become enlarged, and was out of repair, and that the paving-blocks and dirt had been washed away, and that the only gutter was a furrow through the mud. The refused instructions of the appellant referred only to the original construction of the sewer, and ignored the question whether or not the same, after it was constructed, had been kept in proper repair; they

ignored the doctrine that where the city has adopted a plan and created an existing condition in a street in pursuance thereof, if that condition renders the street unsafe, the city must go further and perform the duty cast upon it, growing out of the statute, to exercise ordinary care to make the street, thus encumbered with the product of its plan, reasonably safe for public travel. For this reason, the court committed no error in refusing the instructions asked by the city.

We do not think that there was any error in the admission of the evidence of the expert witness who was examined by the plaintiff. His testimony was directed to the point that, if the opening or sewer inlet to a catch-basin is more than one foot wide, it is practicable to put an iron grating over it. It appeared that the witness had been a sewer builder for the city for eighteen years, and was familiar with the construction of catch-basins, inlets, and openings of sewers.

The judgments of the appellate court and of the superior court of Cook county are affirmed.

MUNICIPAL CORPORATIONS — DAMAGES — LEGISLATIVE FUNCTIONS.—There is a distinction between injuries incidental to the exercise of municipal legislative functions and direct positive wrongs. For the former no action will lie, but for the latter the party injured may recover: *Tate v. St. Paul*, 56 Minn. 527; 45 Am. St. Rep. 501. In the discharge of its purely governmental functions, a municipal corporation to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties or the execution of such powers: *Love v. Atlanta*, 95 Ga. 129; 51 Am. St. Rep. 64.

MUNICIPAL CORPORATIONS.—THE LIABILITY FOR DEFECTIVE SEWERS is the subject of the monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 737. See, also, the note to *Tate v. St. Paul*, 45 Am. St. Rep. 504.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—The duty to keep streets in repair is a ministerial duty devolving upon the municipality, for a breach of which an action lies in favor of a party injured by reason of a neglect of such duty: *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847, and note; *Dunn v. Barnwill*, 43 S. C. 398; 49 Am. St. Rep. 843, and note; *Blyth v. Waterville*, 57 Minn. 115; 47 Am. St. Rep. 596, and note; *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823, and note.

WITNESSES—EXPERTS—WHEN COMPETENT.—To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry: *Laing v. United New Jersey R. R. etc. Co.*, 54 N. J. L. 576; 33 Am. St. Rep. 682.

SANDS v. POTTER.

[165 ILLINOIS, 397.]

CONTRACTS—MENTAL CAPACITY.—Where defendant seeks to avoid a contract made by him on the ground of his want of mental capacity to enter into it, an instruction that though the jury should believe that he had insane delusions on some subjects, yet if such delusions in no way related to the plaintiff or the subject matter of the contract in question, and in making such contract defendant was in no sense influenced thereby, but in making the contract he possessed mind, memory, and sense sufficient to know and comprehend its scope and effect, then he was mentally capable of making it, is not incorrect.

CONTRACTS—MENTAL CAPACITY.—A defendant resisting an action upon a contract made with him, on the ground of want of mental capacity, is not entitled to have the jury instructed that if he was mentally incompetent to protect his interests in making the contract, he should be found mentally incompetent, and the contract disregarded as invalid, although he understood it when he made it.

MASTER AND SERVANT—INSANITY.—The insanity of a master does not terminate a contract for service entered into between him and a servant while he was sane. Notwithstanding such insanity, the mutual engagement of hire and the object of service remain. The rule is applicable, though the contract gives the employer the right to terminate it at any time, and such right cannot be exercised by him because of his insanity, for, in such circumstances, the court might authorize his guardian or other representative to exercise the option, if its exercise was deemed in the interests of the employer.

MASTER AND SERVANT.—THE FORMATION OF A CORPORATION BY A MASTER after the employment of his servant, in the name of which the business is subsequently carried on, all the stock being taken by the master, and the business conducted as before, does not abrogate the contract of employment, and the master remains liable to his employé.

PROFITS OF BUSINESS, WHAT ARE.—Where an employé was to have a specified percentage of the profits of his employer's business, the latter is not entitled to have the jury instructed that, in estimating such profits, they must allow for the annual depreciation of the plant used in the business, if it appears that there is no general rule upon the subject. The jury may be left to determine from the evidence in the cause, including that afforded by the employer's own books, what was contemplated by the contract as profits of the business.

PRACTICE—JURY TRIAL.—If the counsel for the defendant desires to make an opening statement to the jury, he may be required to make it at the close of the plaintiff's statement, and has no right to reserve his statement until after the plaintiff has closed his case. This question is one which is within the discretion of the trial court.

Charles Wheaton and Mark Sands, for the appellant.

C. F. Irwin and Bostford & Wayne, for the appellee.

399 BAKER, J. Obadiah Sands, the appellant, was engaged in the business of making, buying, and selling butter and cheese.

On January 30, 1891, he and Charles H. Potter, the appellee, entered into a written contract, as follows:

"This agreement made this thirtieth day of January, A. D. 1891, between O. Sands, of Chicago, Ill., party of the first part, and C. H. Potter, of Elgin, Ill., party of the second part:

"Witneseth: That in consideration of one dollar to each in hand paid, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to employ the party of the second part for a period of three years, and to pay said second party the sum of \$1,800 per annum, payable monthly, and also to pay said second party five per cent of the first \$20,000 of the profits of his butter, cheese and creamery business, and also ten per cent of the next \$10,000 of the profits of his business, and twenty per cent on all profits in excess of \$30,000 per annum, payable annually. Said second party agrees to give his time and services, to the best of his abilities, to the interest of the business, under the direction of said first party. It is further mutually agreed by and between the parties hereto, that said first party can, at his option, terminate this contract at any time. If this agreement should at any time be terminated by the said first party, he shall pay as damages for such termination \$150 at time of such termination, and shall pay said second party his percentage of the profits of said business for the term of six months after such termination of this agreement.

"O. SANDS,
"C. H. POTTER."

"Witness: E. D. SULLIVAN."

Appellee at once entered the employment of appellant under this contract and continued for the designated ⁴⁰⁰ period of three years to do such work as he was directed. He attended to the purchase and sale of butter and to watching the market on the board of trade of the city of Elgin, at times manipulating the market so as to raise the price of butter artificially; he bought and sold butter otherwise than on said board; sold cheese, made various trips east and on the road in effecting sales of butter and cheese and building up a trade; carried on correspondence in furtherance of the same objects; assisted in making purchases of additional creameries, and did other work when required. He had nothing to do with operating the creameries or manufacturing butter or cheese. During the three years of the employment of appellee, the business of appellant was much more successful than it had been previously. The profits of the business for said three years were as follows: For 1891, \$35,-

841.59, for 1892, \$47,883.39, and for 1893, \$52,490.76. The transactions of the three years aggregated \$600,000 for the first year, \$800,000 for the second year, and \$850,000 for the third year. At the end of the three years, appellee left the employment of appellant, and shortly thereafter brought this suit to recover the moneys that he claimed still to be due him. The results of a jury trial in the Kane circuit court were a verdict and a judgment for \$14,000 damages in favor of appellee, and the judgment was afterward affirmed in the appellate court for the second district.

The principal ground of defense relied on at the trial was that the contract of January 30, 1891, was void, because entered into by appellant while he was insane or without mental capacity sufficient to make a valid contract. The fact that appellant at that time had sufficient mental capacity to execute the contract is conclusively established by the verdict of the jury and the judgments of the courts below. A contention, however, is made that the verdict was induced by erroneous instructions of the trial court given in that behalf at the instance of the ⁴⁰¹ court below. One of them told the jury that to impeach the written contract for want of mental capacity it must be shown, by a preponderance of evidence, that "the defendant, at the time he executed it, had such a degree of mental weakness that he was incapable of understanding what he was doing and unable to comprehend and understand the terms and effect of the contract, or that the same was procured by some undue influence." Another of them read as follows:

"The jury are further instructed that although they may believe, from the evidence, that either before, at the time, or after the making of the written contract in question defendant had insane delusions on some subjects, yet if the jury further believe, from the evidence, that such delusion was in no way related to the plaintiff or the subject matter of the contract here in question, and that in making such contract defendant was in no means influenced thereby, but that, in the making of said contract, he possessed mind, memory, and senses sufficient to know and comprehend the scope, force, and effect of that contract, then he was mentally capable of making said contract, and the jury should so find."

The criticism made upon these instructions is, that they did not explicitly state that defendant must have had "sufficient mental capacity to protect his own interests in executing the contract." We are not aware that there is any fixed formula of words in which the mental capacity or incapacity of a person to

make a contract must be expressed. It is true that in the case of *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489, in passing upon the question of the mental imbecility that would invalidate a contract, this court said that, "in the absence of undue influence, there must be such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests," and that like language is used in some subsequent cases. But in *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489, it is also said that the contract cannot be impeached "if the contracting ⁴⁰² party still retains a full comprehension of the meaning, design, and effect of his acts." In *Miller v. Craig*, 36 Ill. 109, it is said that mere mental weakness will not authorize a court to set aside a contract if such weakness does not amount to inability to comprehend the contract and is unaccompanied by evidence of imposition or undue influence, and that such is the tenor of all the authorities. Like language is used in *Willemin v. Dunn*, 93 Ill. 511. In *Kimball v. Cuddy*, 117 Ill. 213, the words "a full comprehension of the meaning, design, and effect of his acts," are used as designating the degree of mental capacity existing where the contract is valid, and the expression, such "mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests," is used in designating the degree of incapacity required to render the contract invalid.

It is difficult to apprehend how one can "comprehend and understand the terms and effect of the contract," or, in making it, possess "mind, memory, and senses sufficient to know and comprehend its scope, force, and effect," without being "mentally competent to protect his own interests." This latter phraseology is used in several of the instructions given at the instance of appellant. The legal principle involved in the case is embodied in each set of the instructions—as well those given on motion of appellee as those given on motion of appellant, and the jury had the benefit of the rule of the law expressed in both forms of phraseology. It was not error to give the instructions asked by appellee.

It is urged it was error to refuse to instruct the jury that if the defendant was mentally incompetent to protect his own interest in making the contract, then, although they may believe he understood the same, yet they should find he was not mentally competent and that the contract was invalid. The terms of the instruction are contradictory, and it was likely to mislead the jury by inducing them to believe that although the defendant ⁴⁰³ fully understood the contract, yet that if he did not have sufficient mental acumen to foresee that his business would so in-

crease as that the per cent of the profits agreed to be paid for appellee's services would amount to the large sum it did, and provide against such contingency, then they should find against the validity of the contract. There was no error in refusing it.

It is claimed that if the contract was valid in its inception, yet it was terminated in August, 1891, by appellant exercising the option for which provision was made therein. No contention is made that the rulings upon the instructions relating to the annulment of the contract by the act of appellant were erroneous. The testimony was conflicting upon the question whether appellant ever attempted to exercise the option given him, and the alleged fact of its exercise is conclusively negatived by the judgments we are called upon to review.

In December, 1892, appellant was adjudged insane and was taken to the asylum at Elgin. His wife was appointed conservator. In January, 1894, it was adjudged that he was restored to his reason, and the conservator was discharged. The court refused the motion of appellant to instruct the jury that the insanity of the principal terminates an agency, and that if they found, from the evidence, that the defendant became insane after the making of the contract in controversy, they should find that such contract was then terminated. This refusal is claimed as error, and reliance is placed on *Mechem on Agency*, sections 553, 554, and other authorities, which hold that the after-occurring insanity of the principal operates as a revocation or suspension of the authority of an agent exercising a bare power of authority. The rule in question is not decisive of the rights of the parties to this controversy. The legal relation here involved is not the bare relation of principal and agent, but the relation of master and servant, under a mutual and binding contract. The written contract of January 30, 1891, established ⁴⁰⁴ the latter relation between the parties. It was a contract of hiring and service, and there were mutual engagements—on the one part to serve and on the other to employ and pay. The fact that one party to a contract becomes insane during its performance does not necessarily either suspend or annul such contract. If appellee's services were worth 5,000 a year over and above what he was receiving under the contract, it would hardly be contended that immediately upon the adjudication of insanity he could have abandoned the contract and gone into the service of a rival dealer in butter and cheese without incurring any liability to appellant for so doing. One party cannot be held bound and the other released. The statute, chapter 86, section 12, provides that

the conservator, by permission and subject to the direction of the court which appointed him, may perform the personal contracts of his ward made in good faith and legally subsisting at the time of the commencement of his disability and which may be performed with advantage to the estate of the ward, and we know of no rule of law which would relieve the estate of an insane person from liability and damages for the nonperformance of a valid contract of such insane person.

But it is urged the right to declare an option, under the contract, was personal to appellant and to be exercised only by him, and therefore the rights under the contract were no longer mutual. The mutual engagements of hiring and paying and of service still remained, and even if one of the parties, without any fault of the other, was disabled from availing of the option that was given him in addition thereto, we know of no rule of law that would necessarily abrogate such mutual engagements. However, a court of chancery would, in a proper case, authorize the conservator to exercise the option on behalf of his ward, and possibly even the county court which appointed the conservator and has charge of the administration of the estate of the ward could make all ⁴⁰⁵ necessary and proper orders in the premises. Our conclusion is, there was no error in refusing the instruction.

It appears that in May, 1891, appellant caused a corporation, known as the Elgin Creamery Company, to be formed, and that thereafter that name was used in the business. At the trial of this cause, and at the close of the evidence, he moved to exclude all evidence of the services rendered or the value of them after the formation of such corporation. This motion was overruled and an exception taken. The court also instructed the jury as follows:

"Although the jury may believe, from the evidence, that on or about May 4, 1891, there was an incorporation effected by the name of the Elgin Creamery Company, and that such name was afterward used in connection with the business of defendant, yet if the jury further believe, from the evidence, that such corporation was formed for the purpose of convenience or policy in conducting defendant's business, that after its formation, business was in fact carried on by O. Sands, and without change except as to using such corporate name, and that the plaintiff's employment remained the same as before, and that there was no understanding or agreement between the defendant and plaintiff that the formation of said corporation should affect the plaintiff's employment in duties or compensation under the writ-

ten contract in question, then such creation of said corporation and the use of such corporate name would not affect the rights of the plaintiff in said written contract."

It appears from the evidence that in the shipments of product and in the correspondence relating to the business before May 1, 1891, the name "Boone County Butter Company" was used, and after that date that of "Elgin Creamery Company" was in use, but it also appears from the evidence that there was no change otherwise in the manner of conducting the business. All the capital invested in the business, before and after, was furnished ⁴⁰⁶ by appellant. All the contracts and purchases of creameries were made in his name. The bank account was kept in his own name and all checks were signed with his name, and all the profits received from the business were received and appropriated by him. The manner of keeping the books was not changed and no dividends of the company declared or paid. Appellant subscribed for 498 of the 500 shares of capital stock, and the other two shares were subscribed for, one share each by two employes of his, and neither of said employes ever paid for or was the real owner of any share, but each of them nominally held one share in order to qualify them, respectively, to act as directors. He was always the real owner of all the shares and all the shares continuously stood in his name, except the few that necessarily, but nominally only, were transferred to his employes and attorneys in order they might be directors and be enabled to perpetrate a fraud on the statute. Under this showing we agree with the appellate court that the incorporation of the Elgin Creamery Company was a mere nominal affair, and that the contract between appellant and appellee was not abrogated because of its formation. The creamery company was a mere means or mode adopted by appellant for conducting his own individual business—a mere instrument or tool used by him for that purpose: *West Chicago Street R. R. Co. v. Morrison etc. Co.*, 160 Ill. 288. No reason is perceived why appellant, who, under his contract, was entitled to the services of appellee for three years, could not direct appellee to work for him (appellant) in and about his (appellant's) business, which he owned and carried on in the name of Elgin Creamery Company.

We think there was no substantial error in any of the rulings of the trial court upon this branch of the case.

The declaration contains the common counts only. One of the assignments of error is, that the circuit court allowed the plaintiff to introduce in evidence his special ⁴⁰⁷ contract under

the common counts, there being no special count on the contract; and it is also assigned as error that the jury was instructed that if the evidence shows that appellee well and faithfully performed all services that were required of him by the terms of the contract, then he is entitled to recover the full compensation therein agreed to be paid for such services. While a contract continues executory the plaintiff must declare specially, but when it has been fully performed on his part, and nothing remains to be done under it except for the defendant to pay, the plaintiff may, at his election, declare generally in indebitatus assumpsit: *Lane v. Adams*, 19 Ill. 167; *Throop v. Sherwood*, 4 Gilm. 92; *Tuunison v. Field*, 21 Ill. 108; *Adlard v. Muldoon*, 45 Ill. 193. And the stipulated price due on a special contract may be recovered in indebitatus assumpsit where the contract has been so completely executed as that only the duty to pay the money remains: *Adlard v. Muldoon*, 45 Ill. 193; *Illinois Linen Co. v. Hough*, 91 Ill. 63. There was no error, then, in admitting the written contract in evidence, or in instructing the jury that, in the event of a right of recovery, the measure of damages would be the contract price.

Appellee did not waive his right to claim the contract price as the measure of damages simply because, in rebuttal, he introduced evidence tending to show what his services were reasonably worth. In part the defenses made were, that the special contract was void ab initio because of appellant's insanity, that it was subsequently terminated by his exercising his option, and also that it was abrogated by his after-insanity. If either of these defenses were sustained, then appellee, for all or a part of his services, could recover only on a quantum meruit, and it is manifest the introduction of the testimony in rebuttal was not an abandonment of the contract price, but a provision to meet any contingency that might follow the findings of the jury on the issues.

408 It is claimed that the expense account of appellee, amounting to \$1,052.51, should have been charged to appellee, because the contract made no provision for it. Appellee testifies that after the making of that contract appellant informed him that he expected to pay his expenses, and that the first money that appellant paid him was a \$50 check for expenses to go to New York on his business. However, it is useless to pursue the subject, for no question of law in regard to this expense account is preserved for our consideration, either by objection to testimony, ruling upon instructions, or otherwise.

It is argued quite at length that even upon the theory of a right to recover, as a part of the compensation of appellee, the rates per cent on the profits of the business, yet the assessment of damages by the jury was excessive. The question of the amount of damages is a question of fact, and upon it the decision of the appellate court is final and conclusive. It is true, however, that the question what is the measure of damages, or what is the rule for assessing the damages in a particular case, is a question of law: *Johiet v. Weston*, 123 Ill. 641; *Barclay v. Warne*, 143 Ill. 19.

It is claimed that in the schedule of profits upon which the verdict was based, sufficient reductions were not made in either year from the gross receipts of that year. It is conceded that the compensation of appellee was computed by the jury upon the profits as shown by the books of appellant himself, and by the testimony of Sullivan, his book-keeper. One Kingswell, an accountant and book-keeper, was produced by appellant as a witness, and he stated he thought it a very proper thing to allow an annual depreciation on the plants as a deduction from profits, and that he would consider the profits to be that which was earned over and above interest on the money invested as capital in the business, but he also testified there is no general rule, and almost as many different ways as there are different book-keepers, and a great ⁴⁰⁰ many theories and different methods. The court refused to give an instruction which assumed that whatever said Kingswell had testified was a proper thing was to be implicitly followed as the rule of the law in the premises. The court virtually left it for the jury to determine, from all the evidence in the case, including that afforded by appellant's own books and the testimony of his book-keeper, what was contemplated by the contract as the profits of the business. We find no error in refusing to give the instruction that was submitted by appellant in that behalf.

In the bill of exceptions the following appears: "The plaintiff's counsel having closed his opening statement on the part of the plaintiff, Mr. Wheaton, counsel for the defendant, stated as follows: 'The counsel for the defendant reserve their opening statement to the jury on the part of the defendant until the plaintiff shall have closed his case and the defendant is called upon to put in his defense.' To which the counsel for plaintiff objected. Thereupon the court held that if the counsel for the defendant desired to make an opening statement to the jury on the part of the defense he has to make it now, at the close of

the opening statement of the counsel for the plaintiff. To which ruling of the court defendant, by his counsel, then and there excepted." Whether or not counsel for appellant made an opening statement to the jury, and if he did at what time he made it, are matters upon which the record is silent. The practice in this state has always been such as is indicated by the ruling of the trial court. On the other hand, according to the usual course of practice at common law, the opening statement of the defendant is not made until the evidence of the plaintiff has been heard and the plaintiff has rested. In view of the practice that has so generally prevailed in this state from its organization, it must be held that it is a matter within the discretion of the trial court whether a defendant shall be allowed to reserve ⁴¹⁰ his opening statement until the plaintiff has closed his evidence, or be required to make it immediately upon the heels of the opening statement of counsel for the plaintiff. There was no error in the ruling of the court in that behalf.

We find in the record no sufficient ground for reversing the judgment of the appellate court. It is affirmed.

Mr. Justice Cartwright took no part.

CONTRACTS—MENTAL CAPACITY.—The question in all cases where incapacity to contract from defect of mind is alleged is, not whether a person's mind is impaired nor whether he is afflicted by any form of insanity, but whether the powers of his mind have been so affected by his disease as to render him incapable of transacting business like that in question: *Dennett v. Dennett*, 44 N. H. 531; 84 Am. Dec. 97.

INSANE PERSONS—LIABILITY FOR BREACH OF CONTRACT.—If a person is sane when he enters into a contract, he is answerable for his subsequent breach thereof committed by him when insane: *Williams v. Hays*, 143 N. Y. 442; 42 Am. St. Rep. 743.

PROFITS GENERALLY MEANS the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account: *Hasletine v. Belfast etc. R. R. Co.*, 79 Me. 411; 1 Am. St. Rep. 830.

WEST CHICAGO STREET RAILWAY CO. v. MUELLER.

[165 ILLINOIS, 499.]

EVIDENCE.—NEGATIVE TESTIMONY is not entitled to the same weight as affirmative.

JURY TRIAL—WEIGHT OF EVIDENCE.—It is never the province of the court to tell the jury which class of conflicting testimony is entitled to greater weight.

NEGATIVE TESTIMONY, WHAT IS.—If one or more witnesses testify to being present upon a designated occasion and that certain facts then took place, and other witnesses testify to being present at the same time and that such facts did not take place, the testimony of the latter is not negative.

Egbert Jamieson and John A. Rose, for the appellant.

James B. McCracken and Albert M. Cross, for the appellee.

⁴⁹⁹ WILKIN, J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county in favor of appellee, against appellant, for a personal injury. The alleged injury resulted from a collision between a grip-car of the defendant and an express wagon on which the plaintiff was riding, at the crossing of Madison street and California avenue, in the city of Chicago. The declaration consisted of three counts, the first charging the defendant with negligence in failing to sound a gong, the second in running its car at a high rate of speed, and the third charging both these acts of negligence, and ⁵⁰⁰ setting up that plaintiff's view was obstructed by standing cars on another track. The judgment was for five thousand five hundred dollars.

On the trial before the jury there was a conflict in the evidence as to the alleged acts of negligence. The court, at the instance of the plaintiff, gave this instruction to the jury, which is assigned for error: "The court instructs the jury that when one or more witnesses testify to being present upon any occasion and that certain facts then took place, and other witnesses of equal credibility, having equal means of knowing what took place, testify that they were present on the same occasion and that such facts did not take place, then the testimony of the latter witnesses is not what is known as negative testimony, but it is entitled to be regarded by the jury as affirmative testimony, and in such case it is the duty of the jury to weigh all the testimony and give a verdict as the weight may preponderate to the one side or the other."

It is unquestionably the law, and has been frequently so announced by this court, that negative testimony is not entitled to

the same weight as affirmative testimony, and the rule has been applied to cases in which one set of witnesses testified that a bell was rung or a whistle sounded and others stated they did not hear it, the testimony of the former being held of greater weight. We have also held that where the two classes of witnesses are of equal intelligence and have equal opportunities of knowing the fact, and their attention has been directed to it, then, although one testifies that the occurrence did take place and the other that it did not, the latter testimony is not to be treated as negative: *Rockford etc. R. R. Co. v. Hillmer*, 72 Ill. 235. This instruction was doubtless intended to do no more than to give the jury a rule for weighing the testimony of witnesses whose evidence might be regarded of a negative character, and while it is justly subject to the criticism of being argumentative, taken as a whole we are not able ⁵⁰¹ to see that it could have misled the jury to the prejudice of appellant. Whether the testimony of the witnesses swearing that the gong was not sounded should be treated as negative in no way depended upon whether other witnesses testified that it was sounded, and the instruction was perhaps liable to be understood by the jury as an intimation from the court that the testimony of a witness of the one class was entitled to the same weight as that of a witness of the other class, and so understood would be erroneous. It is never the province of the court to tell the jury which class of conflicting testimony is entitled to the greater weight: *Rockwood v. Poundstone*, 38 Ill. 199; *Rockford etc. R. R. Co. v. Hillmer*, 72 Ill. 235. We think, however, taken as a whole, fairly and intelligently construed, it amounted to no more than telling the jury that if there was a conflict in the evidence of the witnesses as to whether a fact existed or not, it was the duty of the jury to weigh all the testimony and give a verdict as the weight might preponderate to the one side or the other. Sixteen instructions were given at the instance of the defendant, and they fully instructed the jury as to the requirement of the law that the plaintiff could only recover by proving his case as alleged, by a preponderance of the testimony. We are of the opinion, therefore, that there was no reversible error in giving the instruction.

Some objection was urged in the appellate court to the admission of testimony on behalf of the plaintiff, but we think there was no substantial error in that regard. The real question in the case is one of fact—that is, whether the defendant's servants were guilty of the negligent acts charged in the declaration, thereby inflicting the alleged injury upon the plaintiff. We

are unable to see any reasonable ground for holding that that question was not fairly submitted to the jury by the instructions. The verdict of the jury and the judgment of affirmance in the court below have therefore settled the question in ⁵⁰² the plaintiff's favor, and, even if slight errors did appear in the record, not materially affecting that finding, the judgment could not properly be reversed on that account.

The judgment will be affirmed.

EVIDENCE—NEGATIVE TESTIMONY—WEIGHT OF.—No general rule can be made concerning the relative value of positive and negative testimony. It depends upon the opportunity of the witnesses for knowing and the attention they have directed to the matter: *Denham v. Holeman*, 26 Ga. 182; 71 Am. Dec. 198, and note. Positive evidence preponderates over negative in weighing contradictory testimony, other things being equal, but the jury's attention in the application of this rule should be directed to the facts and circumstances of the case to prevent its unjust operation: *Farmers' etc. Bank v. Champlain Transp. Co.*, 23 Vt. 186; 56 Am. Dec. 68. Affirmative testimony outweighs negative as a general rule: *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Chicago etc. R. R. Co. v. Still*, 19 Ill. 499; 71 Am. Dec. 236, and note.

DOANE v. LAKE STREET ELEVATED RAILWAY Co.

[165 ILLINOIS, 510.]

STREETS—NEW SERVITUDE.—The erection of an elevated street railway in the streets is not a subjecting them to an improper use or new servitude.

AN INJUNCTION IN FAVOR OF A PROPERTY OWNER AGAINST THE ADDITIONAL USE OF A STREET for an elevated street railway will not be issued where the right to construct such railway has been granted by a city. If a property owner has any remedy, it is only by an action at law to recover damages.

AN INJUNCTION AGAINST THE USE OF A STREET BY AN ELEVATED RAILWAY will not be granted at the instance of an owner of abutting property, though consent to such use has not been properly granted by the municipal authorities. If the injury done to the complainant is capable of being estimated in money, and is recoverable by an action at law, he must resort to that remedy. In such an action, a single recovery can be had for the whole damages, present and future.

STREETS.—THE ILLEGAL OR UNAUTHORIZED USE OF A STREET FOR AN ELEVATED RAILWAY, where the fee of the street is in the municipality, does not entitle an owner of abutting property to an injunction. The only remedy therefor is an information filed by the attorney general in the name of the people, or a bill for an injunction by the municipality.

STREETS.—ABUTTING PROPERTY OWNERS UPON STREETS, the fee of which is in the municipality, are not given any new or additional right therein by a statute requiring the consent of the owners of more than one-half the frontage upon the street before the common council of the municipality can authorize the construction of a railway therein.

Franklin P. Simons, for the appellant.

Hamline, Scott & Lord, amici curiae.

Knight & Brown, and Wilson, Moore & McIlvaine, for the appellee.

⁵¹⁴ WILKIN, J. This is a bill for an injunction by appellant, as abutting property owner, to restrain appellee from building an elevated street railroad in Lake street, in the city of Chicago. The circuit court of Cook county sustained a demurrer to the bill and dismissed it for want of equity. The appellate court having affirmed that decree, this appeal is prosecuted.

The bill alleges that complainant is the owner of five business houses, numbered 33, 35, 37, 39 and 41, fronting on the street between the east line of Market street and the east line of Wabash avenue, holding title to the lots on which they are erected by lease from the owner of the ⁵¹⁵ fee for a term extending from March 1, 1872, to March 1, 1957. It then sets up the passage of an ordinance by the city council, at the request of the defendant, authorizing and permitting it to construct and operate an elevated railroad in the street (a copy of the ordinance being exhibited with the bill), and alleges that the company has accepted the same and is proceeding to construct its road in pursuance thereof. It alleges that such ordinance is illegal and void, because passed without a valid petition therefor signed by owners representing more than one-half of the frontage of the street between said east line of Market street and east line of Wabash avenue, as required by the statute; that the distance between those lines is two thousand eight hundred and ninety-three and sixty-seven one-hundredths feet, being less than one mile, with a total frontage of four thousand five hundred and forty-one and six one-hundredths feet, exclusive of street crossings; that in the preamble to the ordinance it is recited that the petition of property owners fronting on the street between the points named, "representing out of the total frontage of four thousand five hundred and fourteen feet two thousand four hundred and sixty-eight and five one-hundredths feet consenting to the construction and operation of said elevated railroad, has been presented to and is now on file with said council"; that such recital is not true; that there was presented to the said council by the defendant, before the passage of the ordinance, petitions "purporting to be signed by owners of the land representing more than one-half of the frontage on

said Lake street between the east line of Market street and the east line of Wabash avenue"; that the defendant represented to the council that more than half the owners of the frontage had so consented; that a large number of signatures appearing upon said alleged petition were not the signatures of the owners of the property for which they signed, or of any person actually authorized to sign the same or consent for any owner of property for such frontage, but are the signatures of persons purporting to act in a fiduciary capacity, as guardians, trustees, administrators, attorneys in fact, agents, etc. It is next stated that complainant caused the records and files of the probate, ⁵¹⁶ circuit, and superior courts, as well as the records of the recorder of Cook county, to be examined, and obtained surveys of the frontage on said streets, and procured from the city clerk a correct copy of all petitions presented to the council by the defendant of owners purporting to have consented to the construction and operation of said road; that he caused to be made a true and correct search by abstracters of title for the owners of all lands along the route of said road, and on the information so obtained charges that those who signed certain consents were not in fact the real owners of the frontage signed for, some of these allegations being that they were not the owners of record; that guardians, trustees, agents, etc., were not authorized to sign the same, or that their authority so to do was not filed with the city council or presented with the petition. It is further charged, on information and belief, that the defendant, or some of its agents or employes, to procure the consent of certain parties signing said petition, paid them either money, bonds, or stock therefor, and induced others to sign the same by threats and intimidation. It is then alleged that, deducting such signatures so improperly made, less than one-half of the owners representing the frontage on said street consented to the construction and operation of the said road, and that the ordinance authorizing the same is therefore illegal and void, and the defendant has no lawful authority to build its said road, and that, if allowed to do so, certain damages will result to the complainant's property, such as interfering with free access thereto and obstruction of air and light. The prayer is, that the defendant be perpetually enjoined from proceeding with the construction of the said railroad.

The question for decision is, Do the facts well pleaded in this bill entitle the complainant to the injunction prayed for? It is conceded that the common council of the city of Chicago is, by the provisions of our statutes, given exclusive control and su-

pervision of its streets, ⁵¹⁷ the fee of which is vested in the municipality. While they are held in trust for the public use, and can only be appropriated to the purposes for which they were dedicated, it is the settled law of this state that permitting street railroads to be placed therein is not subjecting them to an unlawful use. It has often been so decided by this court as to surface roads, and no good reason has been suggested, and none, we think, can be offered, for making a distinction in this regard between elevated and surface roads. The road in question, if constructed in conformity with the requirements of the ordinance, will certainly obstruct travel upon the street by other means less, and be less, hazardous to the public, than would a surface road. The pillars upon which the superstructure is to be built, which it is claimed will exclude the public from a part of the street, are but a necessary part of the road—as much so as are rails and other parts of tracks constructed upon the ground, or as are trolley-posts placed in the street for operating an electric road by the trolley system. It is true that all these things do, to some extent, interfere with the use of the street by ordinary vehicles, but the inconvenience is one which must be borne for the benefit resulting to the public from the better modes of travel thus afforded: *Moses v. Pittsburg etc. R. R. Co.*, 21 Ill. 516. We held in *Chicago etc. R. R. Co. v. West Chicago Street R. R. Co.*, 156 Ill. 255, that a street railway operated by electricity, with trolley-posts on the streets, was not a new servitude of the street, and that the poles were not unwarranted obstructions in the same, as are telegraph and telephone poles, “because such erections aid and facilitate the use of the public street for the purposes of travel and transportation.” The same is true of the pillars used in constructing elevated roads. In view of the known fact that such elevated lines in large cities greatly accommodate the public by increasing the facility and safety of transit, it can scarcely be seriously ⁵¹⁸ contended that permitting them to be constructed and operated is to subject the streets to a new servitude or unlawful use. The right of a city to permit them is clearly recognized by the act of July 1, 1883, entitled “An act in regard to the use of streets and alleys in incorporated cities and villages by elevated railroads and elevated ways and conveyors”: 2 Starr and Curtis’ Annotated Statutes, c. 114, secs. 201-203.

This court has frequently held that where an additional use of a street has been granted by the city to build and operate a street railroad, an injunction will not be granted to restrain the

construction or operation of the road at the suit of an abutting property owner: *Moses v. Pittsburg etc. R. R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; and that since the constitution of 1870 such owner cannot maintain a bill to enjoin the same until the resulting damages to his property are ascertained and paid, but that his remedy is by action at law for such damages: *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 588; *Chicago etc. R. R. Co. v. McGinnis*, 79 Ill. 269; *Peoria etc. Ry. Co. v. Schertz*, 84 Ill. 135; *Penn Mut. etc. Ins. Co. v. Heiss*, 141 Ill. 35; 33 Am. St. Rep. 273. The same doctrine is recognized in *Corcoran v. Chicago etc. R.R.Co.*, 149 Ill. 291, and *White v. Metropolitan etc. R. R. Co.*, 154 Ill. 620. We said in *Chicago etc. R. R. Co. v. West Chicago Street R. R. Co.*, 156 Ill. 273: "Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages."

But it is insisted on behalf of complainant that on the facts set up in his bill the ordinance must be treated as passed without the required consent of abutting owners, ⁵¹⁹ and therefore illegal and void, which being true, the defendant should be held as proceeding with the work without any authority of law whatever, whereas in the cases referred to lawful consent of the city was shown. The real ground upon which relief by injunction is denied in such cases is, that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property. He has no standing in equity on account of public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts. He can only invoke that jurisdiction in order to protect his property from threatened injury. His injury is a depreciation of the property, which is capable of being estimated in money and recoverable in an action at law, therefore a court of equity will not interfere by injunction. As stated by Chief Justice Fuller in *Osborne v. Missouri Pac. Ry. Co.*, 147 U. S. 253: "But where there

is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and a remedy at law in fact inadequate before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere." To the same effect is the language used in the opinion of Justice Brewer in *In re Debs*, 158 U. S. 591.

In *Morris etc. R. R. Co. v. Pruden*, 20 N. J. Eq. 530, cited in *In re Debs*, 158 U. S. 591, it is said: "Mere diminution of the value of the property of the party complaining, by the ⁵²⁰ nuisance, without irreparable mischief, will not furnish any foundation for equitable relief: *Zabriskie v. Jersey City etc. R. R. Co.*, 13 N. J. Eq. 314. It must not be overlooked that the defendants are engaged in a public work by the completion of which the public interest will be greatly advanced. The injunction by which the progress of the work is arrested must not only cause great injury to the defendant, but also is the occasion of great inconvenience to the public." And again: "The defendants will not occupy with the proposed track any of the plaintiff's lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property he has his remedy by action at law, whenever and as often as loss or damage ensues; and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance, or for its removal. But a strong case must be presented and the impending danger must be imminent to justify the issuing of an injunction as a precautionary and preventive remedy": *Drake v. Hudson River R. R. Co.*, 7 Barb. 508.

In *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561, Mr. Justice Scott, in the opinion adopted by the court, said: "The track is to be constructed on lands not owned by complainants, and under a license from the only party having lawful authority to grant the privilege, and any expected damages that may be sustained by reason of the proposed work can only be recovered in an action at law. Equity will not entertain jurisdiction to enjoin the proposed work": Citing *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 588,

and other cases. And Justice Mulkey, dissenting, also said: "If the proposed railway, when put in operation, would be open to the public generally, then I concede, under the prior decisions of this court, an injunction would not lie at the suit of a private individual, however much he ⁵²¹ might be injured by the building and operating of such road. But such is not the case here."

It was said in *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 590: "The claim is, that upon the principle of strict construction the company must be confined within the limits of the defined district. Without undertaking any discussion of this question, it is sufficient to say that the fee of the streets is in the city, and it has the power to control and regulate their use, and any such excess of authority in the use of a street as is here claimed must be left to be redressed by the public authority, and equity should not, in such case, at the suit of a private individual, enjoin the operating of a railroad." This case has been often cited with approval in later cases.

Where the use of the street has not been legally authorized, as held in *McCartney v. Chicago etc. R. R. Co.*, 112 Ill. 611, *Hunt v. Chicago Horse etc. Ry. Co.*, 121 Ill. 638, *Chicago etc. Ry. Co. v. Quincy*, 136 Ill. 489, and *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620, an information in chancery by the attorney general or state's attorney on behalf of the people, or, as in the last-named case, a bill for injunction by the city, affords a proper and complete remedy. If, as contended, the abutting owner can also maintain a bill on the same ground—that is, that the building of the road is without the valid consent of the city—then the language in *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 590, "and any such excess of authority in the use of a street as is here claimed must be left to be redressed by the public authority," must be overruled and the authorities above cited as to the remedy by the attorney general or city qualified. If a railroad is legally authorized, no one can enjoin its construction. In other words, it is only when the consent of the city has not been lawfully obtained that anyone can complain in a court of equity, and, therefore, when it is said "the remedy is by the public authorities, the abutting property holder being remitted to his action at law for ⁵²² damages," cases in which the work is unlawful must be contemplated, and such is clearly the force of *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 590. This doctrine is recognized again in *Coreoran v. Chicago etc. R. R. Co.*, 149 Ill. 291. In *Peoria etc. Ry. Co. v. Schertz*, 84 Ill. 135, the ordinance authorized the laying of a track along a street

on condition that the consent of property owners on the opposite side of the street should first be obtained, but the company proceeded with the work without complying with that condition, and a bill for injunction by an abutting property holder was filed. As shown by the bill in that case, the defendant was proceeding illegally and certainly without the consent of the city, and the question was directly brought to the attention of the court, as appears from the dissenting opinion there filed, but the relief was denied.

The principle is, that the abutting property owner having a complete remedy at law, a court of equity will not, upon his allegation that the ordinance authorizing the construction is illegal, enjoin the defendant from proceeding until the question of illegality can be litigated and determined, but will remit him to his action at law—and this, it seems to us, is a just and reasonable rule, the enforcement of which will protect the rights of all parties interested. To hold otherwise would be to render impracticable the building and operation of street-car lines under our statute. While such improvements are owned and operated by private individuals or corporations, the use of the streets is public and not private, and upon that theory alone they are permitted to be constructed in the streets, and it will not be denied that in large and populous communities they are of great public utility, if not a public necessity. While, therefore, the private owner is entitled to have all his property rights fully protected, that right should be accorded him, if possible, by a remedy which will not unnecessarily injure others and render impossible the construction and operation of necessary facilities for public travel. A moment's ⁵²³ reflection will, we think, convince anyone that if every abutting owner not consenting may enjoin street railway companies from building their lines in streets, upon the ground that the consent of the city has not been legally obtained, because of facts alleged which do not appear upon the face of the proceedings, the building and operation of all such lines will become practically impossible. In a case like this, the work would necessarily be stoppped until titles to abutting property could be adjudicated and settled, the powers of agents, etc., determined, and the motives which may have prompted owners to give their consent inquired into; and after this had been done, which, in the ordinary course of litigation, would require many months or even years of time, if the facts should be found in favor of the validity of the ordinance, the work could proceed as to this complainant, he still being entitled to his as-

tion for damages. The decision, however, would settle the validity of the ordinance between him and the defendant, and no one else. Any number of other owners might, in succession, procure injunctions on the same or similar grounds, and prosecute them to a like final determination. Manifestly, neither persons nor corporations would hazard capital in an enterprise subject to such uncertainty and delay. There is a certain, adequate, and complete remedy at the suit of the public whenever there is a threatened or actual unlawful obstruction of the streets and highways, and, as we think, an equally certain, adequate, and conclusive remedy to the abutting owner for all his damages, present and prospective. The contention that he cannot have such remedy by a single action we deem untenable. It is not denied that the damages for which he would be entitled to recover are the same in kind as if the building of the road were lawful.

But it is said that, being in the street unlawfully, the obstruction is a public nuisance, subject to be abated and removed at any time, and therefore the recovery could only be had for damages to the time of bringing the suit. ⁵²⁴ This position is based upon the proposition that a railroad unlawfully in a street is a public nuisance, and liable, as such, to be abated at any time, and therefore a recovery for damages can only be had to the time of bringing the action, and hence a multiplicity of suits will become necessary to give the complainant a complete remedy. The position is untenable. The injury would be a continuing and permanent one, and therefore a single recovery can be had for the whole damages, present and future: *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 841, and authorities cited; *Galt v. Chicago etc. Ry. Co.*, 157 Ill. 125. Moreover, we think it clear the defendant, if sued for resulting injury, could not be heard to say its road was a nuisance or built in violation of law. Having accepted and availed itself of the grant of authority from the city to occupy the street, it would be estopped to question the validity of that authority. For the purposes of a recovery against it of damages, whether present or prospective, its road must be deemed lawfully in the street and it compelled to fully compensate all parties injured upon that theory. This proposition seems to us so reasonable that authorities need scarcely be cited in its support. It is, however, fully sustained by the following cases: *Chicago v. Wheeler*, 25 Ill. 396; *Higgins v. Chicago*, 18 Ill. 276; *People v. Maxon*, 139 Ill. 306; *Heims Brewing Co. v. Flannery*, 137 Ill. 309; *Joy v. St. Louis*, 138 U. S. 51.

It is again urged, that sections 1 and 2 of the statute of 1883,

known as the "Frontage act," give abutting owners a new right in streets that is enforceable in equity. We have carefully considered this branch of the case and the arguments of counsel in its support, and are unable to find anything in the statute to warrant the conclusion. It is substantially the same as paragraph 90, section 63, of the city and village act, and it must be admitted that if one of these statutes has the effect of conferring a new property right upon abutting owners ⁵²⁵ the other has also. We think it is manifest that these provisions were intended merely as a restriction upon the authority of city councils and boards of trustees in cities and villages to authorize the laying of railroad tracks along streets or alleys, and in no way add to the rights of such owners in the streets. The amount of damages which such an owner is entitled to recover for injury to his property is certainly no greater since the passage of these statutes than it was before. We scarcely think it will be contended that in estimating the damages done to adjacent property the frontage act can in anyway enter into the consideration. In fact, we understand it to be conceded that the measure of complainant's recovery in an action at law would be the same whether the improvement is lawfully in the street or not, except as it is contended that damages can in the latter case only be recovered to the date of bringing the action. If the requisite consent is not given the ordinance may be treated as illegal, as the one in *Metropolitan etc. Ry. Co. v. Chicago*, 96 Ill. 620, was held to be, for want of the required notice, and that illegality would, as we have already said, authorize an action on behalf of the public, but would give an abutting owner no right to relief in a court of equity. For the same reasons, it must be so held where the alleged illegality is the want of the required petition by owners of the frontage.

Our conclusion, upon considering the whole case, is, that the demurrer was properly sustained and that the judgment of the appellate court should be affirmed.

Able and elaborate arguments have been filed by counsel for the appellant, and authorities cited, which, it is insisted, sustain a different view as to equity jurisdiction. Keeping in mind the fact that the proposed construction of defendant's road will impose no unwarrantable additional servitude upon the street, none of the decisions of this court referred to are in point. Those cited from the state of New York are distinguishable in that there the ⁵²⁶ holding is that the abutting property holder can in no case recover future damages in an action at law, and equity

jurisdiction is for that reason entertained—in other words, having no complete and adequate remedy at law, courts of equity will afford him that remedy. Without undertaking to determine whether decisions cited from other courts are in conflict with the view here announced, it is enough to say that if they are they must also be held as conflicting with our former decisions.

Judgment affirmed.

Magruder, C. J., dissented.

RAILROADS IN STREETS—WHETHER ADDITIONAL SERVITUDE.—The authorized use of a public street for street railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude and does not entitle the abutting landowners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note; *Chicago etc. Ry. Co. v. Whiting etc. Ry. Co.*, 139 Ind. 297; 47 Am. St. Rep. 264, and note; *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86; 43 Am. St. Rep. 547, and note.

INJUNCTION AGAINST USE OF STREET FOR RAILWAY PURPOSES.—Courts will not enjoin or limit the operation of railways in streets unless other ways of travel and transportation are thereby prevented by unreasonable obstruction: *Louisville Bagging etc. Co. v. Central etc. Ry. Co.*, 95 Ky. 50; 44 Am. St. Rep. 203. An injunction will not lie at the suit of an abutting owner, when the entry upon a street by a railway is under the authority of the municipal agency invested with the control of such street: *Penn etc. Ins. Co. v. Helss*, 141 Ill. 85; 83 Am. St. Rep. 273, and note.

LANCASHIRE INSURANCE COMPANY v. CORBETTS.

[165 ILLINOIS, 592.]

GARNISHMENT—JURISDICTION.—A debt may be garnished in any state in which process of garnishment may be served on the debtor, or in which he might be sued and a personal judgment entered against him, based on service of process within the state. The effect of the garnishment is not dependent upon residence in the state of the creditor whose debt is garnished, nor is it necessary that the person or corporation garnished be a resident of the state, if he or it is within the state at the time the garnishment process is served.

GARNISHMENT.—A DEBTOR MAY AT THE SAME TIME BE SUBJECT TO GARNISHMENT IN TWO OR MORE STATES, irrespective of the state of residence or the citizenship of the creditor, if, at such time, actual service of process in different actions may be made upon such debtor in the different states, as where the debtor is a corporation doing business in all the states and having officers in each upon whom process against it may be served.

GARNISHMENT OF A DEBT IN ONE STATE DOES NOT NECESSARILY CONFER UPON THE COURTS OF THAT STATE EXCLUSIVE JURISDICTION of that debt.

GARNISHMENT IN COURTS OF DIFFERENT STATES OF CONCURRENT JURISDICTION.—If a corporation doing business in two states and subject to garnishment in both is first gar-

nished for the debt in one of the states and then in the other, but at the suit of different plaintiffs, and makes a full disclosure in the latter state, and is nevertheless held liable in its courts, notwithstanding the previous garnishment, in the other state, and in pursuance of a judgment pays the indebtedness so garnished, such judgment and payment may be pleaded in abatement of the first garnishment, and constitute a defense to the other proceedings therein.

JURISDICTION, CONCURRENT OF COURTS OF DIFFERENT STATES.—The rule that where courts having concurrent jurisdiction, the one first acquiring jurisdiction will retain it until the matter is fully disposed of, does not apply to courts of different states. In such cases, the suits may proceed concurrently, and if between the same parties, the judgment first rendered may be pleaded in bar of any further maintenance of the other suit.

GARNISHMENT OF THE SAME DEBT IN DIFFERENT STATES.—If the same debt is garnished in different states, the plaintiffs first recovering judgment and obtaining satisfaction thereof obtain priority of right, regardless of the date of the different garnishments, provided there is no fraud or collusion on the part of the debtor. His payment of the judgment first recovered against him is a bar to any further proceedings in the other case, though the garnishment therein is of prior date to that in the case in which the judgment was obtained and satisfied.

Myron H. Beach, for the appellant.

Flower, Smith & Musgrave, for the appellee.

⁵⁹⁴ **CARTER, J.** The appellant insurance company had its domicile of origin in Great Britain, but by compliance with the laws of each of the states of Illinois and Wisconsin relating to foreign corporations it transacted business and kept agents and property in both states. In a proceeding by foreign attachment in the circuit court of Cook county against one Corbetts, who lived in Wisconsin, appellees Wilson Bros. & Co., on October 6, 1892, garnished appellant, by process that day served on its agent in Chicago, for a claim of Corbetts against it upon an insurance policy on a stock of goods in Wisconsin, which goods had on October 3d been partially destroyed by fire. Afterward, but in the same month, garnishment proceedings were instituted in Wisconsin by one Dowling, a creditor of Corbetts; and appellant, by service upon its agent in Wisconsin, was garnished for the same debt owing to Corbetts. Under the facts as they appear, we must hold that the effect of what was done in Wisconsin was that ⁵⁹⁵ appellant set up in the proceedings there the prior garnishment in Illinois, alleging that the jurisdiction here was prior and exclusive, but it was adjudged by the Wisconsin court (a court of competent jurisdiction), following decisions of the supreme court of that state, that the circuit court of Cook county, Illinois, was without jurisdiction in the premises, and that its proceedings were no defense to the suit in Wisconsin. Judg-

ment was then rendered against the garnishee, which it paid under the compulsion of the judgment and of the laws of Wisconsin, which provided that no insurance company against which any judgment existed and remained unpaid sixty days after its rendition should issue any new policy in that state, and prescribed heavy penalties against officers and agents who should violate the statute.

After the first answer in this cause, filed by the garnishee in the Cook county circuit court October 6, 1872, denying all indebtedness to Corbetts, appellees took no further action for nearly two years, nor until the judgment in Wisconsin had been paid, when they filed additional interrogatories. By an amended answer to these interrogatories appellant set up the Wisconsin proceedings, statute, judgment, and the payment of the judgment; also, that at the time of the service of the writ in the case at bar no proofs of loss had been made by Corbetts, and therefore the alleged debt was contingent and uncertain, as it was not by the policy payable until sixty days after the receipt of proofs of loss, and that it was not therefore subject to garnishment. Upon a trial by the court upon agreed facts the defense was overruled, and judgment rendered against appellant for the amount shown by its answer to have become due and payable to Corbetts under the policy and by virtue of the fire loss. The appellate court having affirmed the judgment, appellant now brings the record to this court, insisting that the law has not been properly adjudged to it in the courts below; that, having fully discharged its duty ⁵⁹⁶ under the laws of both states, it should not be compelled to pay the debt twice.

The arguments of counsel have been chiefly addressed to the second question, viz., whether, at the time of the service of the writ upon the garnishee, the alleged debt to Corbetts was anything more than a contingent liability, dependent upon the compliance by Corbetts with the provision of the policy requiring proofs of loss to be furnished by him to appellant within a certain time. But from the view we take of the case it will not be necessary to consider this question. We are free to say, at the outset, that we cannot look with favor upon any construction of the law which would impose a double liability upon a garnishee who, without collusion, fraud, or negligence, has undertaken to fully discharge its duties under apparently conflicting laws of different jurisdictions. It is, of course, true, that every state must enforce its own laws within its own borders for the protection of its own citizens; but either the law, or the construction of

it by the courts, in one or the other of the states is contrary to natural justice, which requires of a garnishee standing indifferent between creditors contending in different states for the same debt, the payment of that debt more than once.

It seems to be the doctrine in Wisconsin, as laid down by the supreme court of that state in *Renier v. Hurlbut*, 81 Wis. 24, 29 Am. St. Rep. 850, that in garnishment proceedings the jurisdiction of the court is dependent upon the situs of the debt sought to be appropriated to the payment of the plaintiff's demand, and that if the situs of the debt is without the jurisdiction, the court has no power to proceed or to render any judgment against the garnishee. Now, it is the generally accepted doctrine that, so far as so intangible a thing as a debt can be said to have a situs, it follows the creditor or owner of the credit, and is at his domicile: *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917; *Pomeroy v. Rand*, 157 Ill. 176; *Wyeth Hardware etc. Co. v. Lang*, 127 Mo. 242; 48 Am. St. Rep. 626; *Story on Conflict of Laws*, sec. 362; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259; 39 Am. St. Rep. 181. And the notion that the situs of the debt determines the jurisdiction of the court in garnishment has led to the creation of the fiction that, for the purposes of garnishment, the situs of the debt is changed and becomes the place where the garnishee lives, and not the domicile of his creditor. As before said, the proceedings must be had in the jurisdiction of the garnishee, where service can be had upon him, but it does not at all follow that it is because that is the situs of the debt. Thus, it is said by Shinn in his late work on *Attachment and Garnishment*, page 863: "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served. This is in harmony with the rule before stated, that the demand must be one on which an action at law could be brought by the principal debtor."

Take the case at bar: Actual service of process in the different suits could be and was had on the appellant company in both states—Illinois and Wisconsin—and it was subject to garnishment in both states, and it would have been subject to similar proceedings in any other states in which, in compliance with their laws, it had established itself for business purposes. Evidently, however, this would not be so for the reason that the debt had a situs in each and all of such states at one and the same time, when it also had a situs at the domicile of the creditor of the

garnishee, but the true reason is, that the garnishee insurance company was liable to suit by its creditor for the collection of the debt in each and all of the states where it had so established itself for business purposes. To hold that the situs of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachments, for the very ground of a foreign attachment is ⁵⁹⁸ the nonresidence of the principal defendant, who, in cases of garnishment, is the creditor of the garnishee, and if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides—that is, where the debt has its situs—it cannot be reached in foreign attachment at all. This is clearly pointed out in an exhaustive opinion by Pitney, V. C., in *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, where he shows the utter fallacy of the reasoning used to support decisions that jurisdiction in such cases depends on the situs of the debt attached or garnished. A further reason readily presents itself in the fact that no proceeding in garnishment of any kind can be maintained where the principal defendant has his domicile—that is, at the situs of the debt—unless the debtor to be served with garnishee process is within the jurisdiction of the court. The principal defendant in attachment proceedings may, except for the purposes of obtaining a personal judgment, be brought into court by constructive service, but jurisdiction of the garnishee can be obtained only by actual service of process: 2 Shinn on Attachment and Garnishment, 1000.

Thus it is seen that in garnishment proceedings the place of residence of the garnishee is of far more importance than the place of residence of his creditor in obtaining jurisdiction to render a judgment against a garnishee: 2 Shinn on Attachment and Garnishment, sec. 490. And it has been expressly decided by this court that a foreign corporation having property and agents in this state and transacting business here may be garnished in our courts for a debt due a resident of the state of its domicile of origin: *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581. See, also, *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; 34 Am. St. Rep. 74. And the reason given is, that the foreign corporation had become subject to the process of our courts. And while the courts of Wisconsin and some other states seem to hold to the doctrine that where there is no personal service of process on the principal defendant, the proceeding must be instituted ⁵⁹⁹ in the jurisdiction where the debt has its situs—that is, the domicile of the principal defendant—or else at the domicile of origin of the garnishee corporation, we are satisfied that

the great weight of modern authority is otherwise and is in harmony with the rule adopted in this state: *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405; *Railroad Co. v. Barnhill*, 91 Tenn. 395; 30 Am. St. Rep. 889; *Handy v. Insurance Co.*, 37 Ohio St. 266; *Wyeth Hardware etc. Co. v. Lang*, 127 Mo. 242; 48 Am. St. Rep. 626; *Nichols v. Hooper*, 61 Vt. 295; *Cross v. Brown* (R. I., 1896), 33 Atl. Rep. 147; *Mooney v. Buford etc. Mfg. Co.*, 73 Fed. Rep. 32.

This rule is limited, of course, to the garnishment of debts, and has no application to attachment or garnishment proceedings to reach tangible property having an actual situs in another state, for in such a case the property sought to be reached is without the jurisdiction of the court: 2 Shinn on Attachment and Garnishment, 858; *Bowen v. Pope*, 135 Ill. 28; 8 Am. St. Rep. 330; *Waples on Attachment and Garnishment*, 237, 249.

It is said by all the authorities that the garnisher is, in his relation to the garnishee, merely substituted to the rights of his own debtor, and can recover only where the principal defendant could recover: *Samuel v. Agnew*, 80 Ill. 553; *Richardson v. Lester*, 83 Ill. 55; 2 Shinn on Attachment and Garnishment, 853; and as the principal debtor could have recovered the debt garnished in the case at bar by suit in Illinois, no good reason appears why attachment and garnishment would not lie in favor of appellees here.

It is obvious, then, that the grounds upon which the Wisconsin court based its judgment are untenable. But the question still remains whether the Wisconsin court did not have jurisdiction to garnish the same debt in Wisconsin under its laws and to render the judgment it did render, and whether the payment of that judgment was not sufficient, when set up in the answer, to bar the further prosecution in Illinois of the suit at bar.

It is well settled that, in ordinary actions, a suit pending in one state cannot be pleaded in abatement or in bar ~~of~~ of another suit in a different state, but that both may proceed until judgment is rendered in one of such suits, when it may be set up in bar of the further maintenance of the other, and that it makes no difference which was first commenced: *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Allen v. Watt*, 69 Ill. 655; *Dunham v. Dunham*, 162 Ill. 589; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447. But the suit in Wisconsin and the suit in Illinois were not between the same parties, the plaintiffs in garnishment in the two cases being different persons, and while both were proceeding to appropriate and recover the same debt to satisfy their respective demands against the same creditor of the

garnishee, it has been held (whether correctly or not we are not called upon to decide) that the judgment in one such case without payment cannot be set up in bar of the other: 2 Black on Judgments, pars. 597, 801. And it has also been held that by the service of the garnishee summons (or trustee process, as it is called in some of the states), the garnisher acquires a contingent or inchoate lien upon the debt, or, as it is sometimes said, there has been an involuntary assignment of the same to him, dependent, of course, for its perfection upon the subsequent obtaining of judgment: *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468; 8 Am. & Eng. Ency. of Law, 1101, note; 2 Shinn on Attachment and Garnishment, 853. And that where, after a garnishee or trustee has been so charged by service of the process, he goes into another state and is there garnished by another person for the same debt, the first proceeding may be pleaded in abatement to the second: *Embree v. Hanna*, 5 Johns. 101; *Wallace v. McConnell*, 13 Pet. 136; *Whipple v. Robbins*, 97 Mass. 107; 98 Am. Dec. 64; *American Bank v. Rollins*, 99 Mass. 313.

Thus, in *Embree v. Hanna*, 5 Johns. 100, Chief Justice Kent, among other things, said: "If the attachment had been conducted to a conclusion and the money recovered of the present defendant, I think it could not have been made a question whether that payment would not be a bar to ^{the} present suit. Nothing can be more clearly just than that a person who has been compelled by a competent jurisdiction to pay a debt once should not be compelled to pay it over again. It has accordingly been a settled and acknowledged principle in the English courts that where a debt has been recovered of a debtor, under this process of foreign attachment, in an English colony or in these United States, the recovery is a protection in England to the garnishee against his original creditor, and he may plead it in bar: Citing cases. . . . If, then, the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending, and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors. The defendant could not afterward lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore, potior est jure*. If we were to disallow a plea in abatement of the pend-

ing attachment, the defendant would be left without protection, and be obliged to pay the money twice, for we may reasonably presume that if the priority of the attachment in Maryland be ascertained, that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here."

Substantially the same doctrine was in a similar case announced by the supreme court of the United States in *Wallace v. McConnell*, 13 Pet. 136. So, also, to a certain extent, in *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64, and *American Bank v. Rollins*, 99 Mass. 313 (Massachusetts cases), where in the latter case it was said: "A trustee process is in the nature of a proceeding in rem. It is a sequestration of the debt due from the ⁶⁰² trustee in order that it may be devoted to the payment of one to whom the trustee's creditor is, himself, indebted"; and it was there said that the doctrine constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea.

In *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64, where it was held that the payment of the judgment rendered in Connecticut in a trustee proceeding begun after the suit was commenced in Massachusetts was not a sufficient defense to the latter suit, where such judgment was obtained by default, the court said: "But the trustee did not make any disclosure of the pendency of the present suit. He withheld from the court in Connecticut this fact essential to a fair adjudication. He allowed himself to be defaulted, and his payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action: *Wilkinson v. Hall*, 6 Gray, 568. What effect we should have given to the payment under the Connecticut judgment if the trustee had been compelled to pay there, notwithstanding a full disclosure of the facts, because the courts of that state had disregarded the pendency of this action and refused to adopt the principles which we regard as settled by *Wallace v. McConnell*, 13 Pet. 136, is a question we need not prematurely consider." In the case cited, *Wilkinson v. Hall*, 6 Gray, 568, the judgment, which had been paid and which was pleaded in bar, was rendered in a trustee proceeding begun after *Wilkinson v. Hall*, 6 Gray, 568, was commenced, and it was held not to be a good bar, because the trustee withheld facts essential to the determination of the cause, and the court said: "It is obviously just that, if he has been compelled to pay the debt once by the judgment of a court of competent

jurisdiction he should not be compelled to pay it again. If, therefore, the debt was recovered of the defendant under a process of foreign attachment, fairly and without collusion on his part, he may effectually plead it in bar here."

⁶⁰³ In *Garity v. Gigie*, 130 Mass. 184, where both suits were begun on the same day, but the trustee, after having been served in the morning in the state of New Hampshire, went to Boston and was there served with process in the afternoon, and judgment was first rendered in the New Hampshire case and was paid, Mr. Chief Justice Gray, in delivering the opinion of the supreme judicial court of Massachusetts, said: "That court [the New Hampshire court] having first acquired jurisdiction of the fund attached, and having, after a full disclosure by the trustee of the facts relating to the suit pending and the service made in this commonwealth, rendered judgment and execution against him upon which he has paid over the fund, that payment affords a conclusive reason for not charging him anew."

It will be noticed that in these cases more importance is given to the fact that judgment had been rendered against the trustee in a court of competent jurisdiction in another state, without fraud or collusion on his part and upon full disclosure by him, and that he had, by compulsion of law, paid such judgment, than to mere priority in time in the beginning of the suits or in the service of the writs. There is, moreover, a distinction, we think, between cases of the character of those above commented on and the case at bar. However slight the distinction may appear, still this is not a case where the garnishee, having been duly served with process of garnishment in one state and become subject to the jurisdiction of the court there, and bound to respond exclusively to whatever judgment that court might render, has gone into another state and there been served with another writ in favor of another creditor of the same debtor, as in *Embree v. Hanna*, 5 Johns. 101. In such a case, the courts of the latter state might well feel bound, upon principles of comity, to recognize as superior the right of the plaintiff in the first suit, which had attached before they had any jurisdiction of the garnishee, and thus, while fully regarding ⁶⁰⁴ the rights of its own citizens, give due observance to the maxim that he who is first in point of time is stronger in right. In the case at bar, the garnishee was established for business purposes and had agents in both states, and was subject to the process and jurisdiction of the courts of both states at one and the same time. While we cannot agree to the doctrine which the Wisconsin courts seem to hold, that the mere fact that because Corbetts, who owned the

credit sought to be reached, resided in that state their jurisdiction was exclusive, neither can we hold that by the mere service of the garnishment writ exclusive jurisdiction was acquired by the court in this state.

If the principle stated in *Wilkinson v. Hall*, 6 Gray, 568, be applied to the case at bar (a case having other features which have been noticed and which make its application still more just), the Wisconsin judgment, having been rendered after a full disclosure by the garnishee of this prior garnishment and without any fraud or collusion on its part, must, together with the enforced payment thereof, be held a complete bar here. This, we think, is obviously true, whether, upon legal principles applicable to the facts of this case, it be held that the proceeding is in the nature of a proceeding in rem, or, without regard to the situs of the res, it be held that the courts of this state have jurisdiction on the ground that the garnishee is subject to the process of our courts and liable to be sued here for the recovery of the debt sought to be appropriated, for if, by legal fiction, it can be said that for the purposes of garnishment in foreign attachment proceedings the res was in this state and might therefore be proceeded against here, still, by no process of reasoning can it be held that it was any the less in Wisconsin at the same time, where not only the garnishee was also established for business purposes, but where its creditor, the owner of the debt, had his domicile. It was therefore a case where there was concurrent jurisdiction in the two ~~one~~ states and exclusive jurisdiction in neither. But the plea in abatement filed in the Wisconsin court went to the jurisdiction of that court by alleging that the jurisdiction acquired by the circuit court of Cook county was prior and exclusive, and, as the jurisdiction of the Wisconsin court was concurrent with said circuit court, the plea was properly held to be insufficient to abate the suit. The rule that where courts have concurrent jurisdiction the one first acquiring jurisdiction will retain it until the matter is finally disposed of does not apply, as before said, to courts in different states, but in such cases the suits may proceed concurrently, and where they are between the same parties the judgment first rendered may be pleaded in bar to the further maintenance of the other suit. This rule has been held to apply to divorce cases where the separated pair are residing and suing for a divorce each in a different state. The suits partaking of the nature of proceedings in rem—that is, as against the status of marriage which exists between the pair in both states—the judgment first rendered dis-

solving the marriage, especially where there has been personal service, is a bar when pleaded to the other suit, though such other suit was first commenced: *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *Dunham v. Dunham*, 162 Ill. 589.

If, then, the courts in both states had the right to proceed concurrently, the judgment first rendered was a valid judgment, and could be, and was, enforced against the garnishee. We have been referred to no case, and we know of none, where a second payment has been enforced upon the state of facts similar to that contained in this record. If the garnishee may, without its fault and after complying in good faith with the laws in both jurisdictions, be compelled to pay the same debt twice, it may be compelled to pay it as many times as there are jurisdictions in which it transacts business; yet it is the doctrine of all the authorities that the garnishee is not to be placed in any worse position by the garnishment ~~see~~ than he occupied as the debtor of the principal defendant, nor subjected to any greater liability because of the garnishment. We have established the doctrine in this state, as before shown (*Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581), that the company was subject to garnishment here because it was subject to the process of our courts, and could be sued and the debt recovered here; but it does not follow that because the writ was first served on the garnishee in this state our courts acquired exclusive jurisdiction, and that the courts of Wisconsin, where the garnishee was also subject to suit for the recovery of the same debt, must await the final action of our courts. It could not reasonably be expected that the courts of other states would accede to such a doctrine, yet nothing short of this would support the judgment appealed from, unless, indeed, it be held that it is the mere misfortune of appellant that it is liable to respond as garnishee for the same debt in every state where it may be temporarily domiciled for business purposes. And it is manifest that the grounds on which it has been held that the courts of this state will sustain garnishment proceedings against foreign corporations present and doing business in this state to reach debts owing to citizens of other states, are equally potent to support garnishment proceedings in another state at the same time in favor of another creditor.

To reverse this judgment is not to discriminate against our own citizens, as contended by counsel. They have the same facilities for obtaining the first judgment, and its satisfaction, as have the citizens of other states, and can exercise the same diligence

and thus avoid conflicts of jurisdiction and the tying up of the fund by indefinite delay. We must, therefore, hold that, by force of the judgment, and its satisfaction, the debt which appellees were seeking to appropriate to the payment of their demand was extinguished, not by the voluntary act, fraud, or collusion of the garnishee (which, by all the authorities, ⁶⁰⁷ would have destroyed its immunity from a second payment), but by compulsion of law. After such payment there was no longer in existence any debt to sustain the further proceedings by appellees in the circuit court of Cook county.

For the error in not discharging the garnishee the judgments of the appellate and circuit courts are reversed.

QUESTIONS SOMEWHAT SIMILAR to those presented and decided in the principal case were involved in *Howland v. Chicago etc. Ry. Co.*, 134 Mo. 475. It appeared in that case that the plaintiff, being the head of a family and a resident of Missouri, did work for the defendant for which he was not paid, and that at least a portion of the money due him was exempt from attachment and execution under the laws of Missouri; that this work was done for the defendant corporation, organized and existing under the laws of Illinois and Iowa, and operating a line of railway extending from Chicago, Illinois, through that state, Iowa, and Missouri; that a resident of Missouri went to Iowa, and brought suit against the plaintiff, taking out an attachment which was served upon the defendant in Iowa, and constructive service was made upon the plaintiff of the summons issued against him in Iowa. The corporation answering the garnishment process admitted its indebtedness to the present plaintiff, but claimed that such indebtedness was exempt from garnishment. After the garnishment had been thus levied, the plaintiff sued the railway corporation in the state of his residence and where he had performed the services for it, claiming that he had never been a resident of the state of Iowa, nor subject to the jurisdiction of its courts, and that the garnishment levied in that state constituted no impediment to the recovery of his demand in Missouri. It appeared, further, that after the garnishment had been levied in Iowa, the corporation presented to the court there an affidavit of the present plaintiff, showing that the wages garnished were exempt from execution, but that the justice of the peace in Iowa nevertheless refused to allow such exemption.

The supreme court of Missouri, as in the principal case, decided that debts have no situs, and may be attached in a state in which the debtor does not reside; that the justice in Iowa had jurisdiction over the subject matter of the action and of that class of cases in which the power to determine all issues which might arise therein, including the question whether the money sought to be garnished was exempt therefrom; that his jurisdiction involved the power to decide erroneously, and his judgment could not be assailed because of error in his decision.

It appeared, however, that no final judgment had been entered in the Iowa case, and the question was therefore presented, whether the attachment there levied could be pleaded as a defense to, or in abatement of, the action brought in Missouri, no payment of the plaintiff's debt having been made under such attachment. The court held that the pendency of the attachment in Iowa did not

abate the Missouri action, but that judgment might be entered in favor of the plaintiff with a stay of execution until he should be released from the garnishment levied in the other state. This course of proceeding in effect gave effect to the Iowa garnishment, unless the courts of that state should, by their action, directly or indirectly release it, and protected the Missouri debtor as amply as the sustaining of his plea in abatement could have done.

GARNISHMENT IN TWO STATES.—Garnishment of wages due from a corporation chartered in two or more states may be effected in each state, though such wages are due to a nonresident for services rendered in another state: *Railroad v. Barnhill*, 91 Tenn. 895; 30 Am. St. Rep. 889.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

HASS v. RUSTON.

[14 INDIANA APPEALS, 8.]

BROKERS-POWER OF, TO MAKE CONTRACTS IN THEIR OWN NAMES.—A broker cannot make a contract in his own name without the knowledge and consent of his principal that will bind both the principal and the other contracting party, or render the principal liable for commissions or damages for the nonperformance of the contract, though he receives a benefit from it.

Action to recover for breach of contract and for commissions. The complaint alleged that the defendants were partners doing business under the firm name of the Melrose Milling Company and engaged in the manufacture and sale of flour in Indiana; that the plaintiff resided in the city of Savannah, in the state of Georgia, and, for several years prior to the time complained of, had acted as a broker for the defendants in said city in the sale of flour; that during such time it was customary for the defendants to furnish the plaintiff, from time to time, quotations of prices at which he was authorized to sell their flour; that such prices were in all cases transmitted by letter or telegram, and that their dealings were all carried on in the same manner; that on August 10, 1891, the defendants sent by mail to the plaintiff a letter which gave quotations on certain brands of flour, and closed with the following statement: "At these prices we hope you can effect some round lot of sales for us. It is cheap property, way wheat keeps climbing up." On August 10, 1891, the defendants also sent to the plaintiff a telegram giving the same prices quoted in the letter of even date, and directing the plaintiff to "push sales." After receiving the letter and telegram, and on August 12, 1891, pur-

suant to the terms mentioned, the plaintiff sold to various persons and firms in the city of Savannah about two thousand barrels of flour. Plaintiff also alleged that he made such sales and entered into contracts for the delivery of the flour at the prices named in the letter and telegram before receiving any notice of any change in prices; that in making such sales, plaintiff did not disclose to the buyers his agency therein, but made the sales upon his own credit, and that the buyers looked to him to carry out and complete said contracts; that by making said sales plaintiff became personally liable to the buyers for the fulfillment of said contracts; that as soon as said sales were made, he notified the defendants by telegram thereof, giving the names of the purchasers, the number of barrels, and the prices at which the sales were made, but that defendants refused to carry out said contracts or to deliver said flour; that after said sales had been made, and after the contracts for the delivery of the flour had been fully executed, and after the plaintiff had notified the defendants of said sales, they notified the plaintiff that they would decline to carry out said contracts, and that they did decline and refused to carry them out or to deliver said flour; that after the defendants thus refused to deliver said flour, the parties with whom plaintiff had contracted purchased an equal quantity of flour elsewhere at the best prices obtainable, but that they were compelled to pay more for flour so purchased than the prices at which plaintiff had sold to them; that plaintiff thereby became personally liable to said parties for such excess, and was compelled to pay, and did pay, that amount to them; and that he is also entitled to one hundred and thirty-five dollars for commissions on the sales so made, which defendants have refused to pay, and for both such excess and commissions he prayed judgment. After a demurrer to this complaint was overruled, defendants answered admitting most of the facts set out in the complaint, but denying liability on the ground that the plaintiff had no authority from them to make the said contracts in his own name, and that they addressed and mailed to the plaintiff on July 20, 1891, a circular letter containing the following notice: "All the sales made by agents or brokers subject to confirmation. Above prices subject to change without notice." After a demurrer to this answer had been sustained, and a demurrer to a subsequent answer alleging the same facts and also a denial of liability for commissions had been overruled, the case was submitted to the court upon the pleadings, and the court thereupon rendered judgment in favor of plaintiff for one hundred and thirty-

five dollars for commissions on said sales, but found that he was not entitled to recover any further sum. Both parties excepted and the plaintiff appealed.

Garvin & Cunningham, for the appellant.

J. E. Iglehart and E. Taylor, for the appellees.

¹⁶ LOTZ, J. It is apparent from the rulings made, and the judgment rendered, that the court below, from the facts alleged in the pleadings, reached these legal conclusions: 1. That the broker had no power to make contracts in his own name and without the knowledge or consent of his principals, which would be binding upon them in favor of the other contracting parties; 2. That as the broker had made contracts which were capable of being enforced by his principals, the principals were liable to him for his commissions; 3. That the circular letter of July 20th relating to the confirmation of sales was not controlling.

The main and controlling question in this controversy is, Can a broker make a contract in his own name, without the knowledge and consent of his principal, that will bind both his principal and the other contracting party?

A broker is a peculiar kind of an agent, and brokerage is a peculiar kind of agency. It is the business of a broker to negotiate contracts between others in matters of trade and commerce. He usually deals with the contracting parties and not with the things which may be the subject of the contract. He has neither interest in nor possession of the property which it is his business to buy or sell for others, and ordinarily he has no implied power to buy or sell in his own name. It is in these respects that a broker differs from a factor and from an ordinary agent.

The office and duty of a broker is stated in Domat's ¹⁷ Civil Law, part 1, book 1, title 17, article 1, as follows:

"1204. The Office of a Broker.—The engagement of a broker is like to that of a proxy, a factor, or other agent; but with this difference, that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner, as to put those who employ him in a condition to treat together personally."

In Story on Agency, the office of broker is thus defined:

"Section 28. Secondly—Brokers.—The true definition of a broker seems to be that he is an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation, commonly called brokerage. Or, to use the brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another, and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. Where he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name. He is strictly, therefore, a middle man, or intermediate negotiator between the parties."

Again, section 34 of the same authority, the difference between factor and broker is thus stated:

¹⁸ "Section 34. A factor differs from a broker in some important particulars. A factor may buy and sell in his own name, as well as in the name of his principal. A broker (as we have seen) is always bound to buy and sell in the name of his principal. A factor is intrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and consequently has no such special property or lien."

1 Bell's Commentaries, page 508, fourth edition, in comparing the duties of factor and broker, says:

"The character of factor and broker is frequently combined, the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. Properly speaking, in these cases, he is factor."

Again the relation of broker and factor is clearly stated by Story, section 109:

"Section 109. Secondly, as to brokers. These, as we have seen, have an incidental authority to sign the contract for, and as the agent of, both parties. A broker employed to effect a policy has an incidental authority to adjust losses upon it; and, if employed to settle losses, he has authority to refer a disputed loss to arbitration. A broker employed to buy or sell without limitation of price has the incidental authority to bind his principal by any price, at which he honestly buys or sells. So, a broker authorized to sell goods without any express restriction as to the

mode may sell the same by sample or with warranty. Ordinarily, he cannot make the contract in his own name, but ought to do it in the name of the principal. There are exceptions, however, by the usages of trade, as in cases of ¹⁹ policies of insurance, which are usually made in the name of the policy broker, and he may then sue thereon. So he cannot buy or sell on credit, except in cases justified by the usages of trade. So a broker has ordinarily no authority *virtute officii* to receive payment for property sold by him; and, if payment is made to him by the purchaser, it is at his own risk, unless from other circumstances the authority can be inferred."

The leading case in which the distinction between a broker and that of a factor and other agents is carefully pointed out, is that of *Baring v. Corrie*, 2 Barn. & Ald. 137 (143). The court, by Abbott, C. J., said: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name." To the same effect Mr. Justice Holroyd observed, in the same case, that a factor "is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, he has also a special property in them and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession ²⁰ of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound": Ewell's *Evans on Agency*, 4.

Again in Ewell's *Evans on Agency*, side page 122, the authority of a broker is most clearly stated, both as to acts authorized and prohibited. After giving fully what is the implied authority of broker, it is stated: "A broker has no implied au-

thority: (a) To buy or sell in his own name. The case of an insurance broker is an exception to this rule; he need not even state that he contracts as a broker; (b) To receive payment for goods sold for his principal. But an insurance broker has authority to receive payment of any loss that may occur on a policy effected by him, if the instrument remains in his hands": See, also, *Irwin v. Williar*, 110 U. S. 499; *White v. Chouteau*, 10 Barb. 202; *Buckbee v. Brown*, 21 Wend. 110; *Dugan v. United States*, 8 Wheat. 172; *Pott v. Turner*, 6 Bing. 702; *State v. Duncan*, 16 Lea, 75.

It would seem, from the authorities, that the only exception to the rule that a broker cannot contract in his own name is in the matter of insurance policies.

The appellant cites and relies upon as holding a contrary doctrine the cases of *Knapp v. Simon*, 96 N. Y. 284; *Saveland v. Green*, 36 Wis. 612. In these cases, however, it appears that the broker made the contract in his own name at the request or with the knowledge of the principal.

The distinction between the powers of a broker and that of a factor is supported by reason as well as by authority. A factor has the possession of the goods, ²¹ frequently has a lien upon them for moneys advanced. He has one of the indices of title. The contract is made upon his credit, and, although in his name, it may be enforced both as against himself and against his principal, and be enforced both by him and his principal against the other contracting parties. An ordinary agent, acting in the scope of his authority, may bind his principal when the contract is made for the principal's benefit, although made in the name of the agent; and the principal may enforce the contract, or it may be enforced against him. Although the contract may have been made upon the credit of the agent, the other contracting party may, when he discovers the principal, elect to pursue the principal instead of the agent, and in some instances he may pursue both: *Mechem on Agency*, secs. 558, 977; *Lawson on Contracts*, sec. 197.

It is true that the principal is bound to indemnify his agent for all acts lawfully done in the execution of his authority. This includes all expenses properly incurred, and extends to all acts done by the agent in the course of his agency in which he has incurred or undertaken a liability or sustained damages: *Lawson on Contracts*, sec. 179.

But the principal is not liable to the agent for acts ultra vires, or in excess of his authority, unless the acts have been ratified.

A broker occupies a peculiar relation to the contracting parties; he frequently represents both, and is often entitled to a commission for buying and a commission for selling in the same transaction. He has no possession that can mislead one of the contracting parties. If he were permitted to make contracts in his own name for his principal, and without the principal's knowledge,²² he would be in a position to take advantage of a rise or fall in prices.

The contract being in his own name, he might claim the profits, and, in the event of loss, cast it upon his principal. His powers might be much abused and the interests of the principal sacrificed. It is for these reasons that the policy of the law forbids a broker from contracting in his own name without the knowledge or consent of the principal.

Appellant's learned counsel contend that the circular letter of July 20th, under the circumstances averred, is not controlling.

This letter and the letter and telegram of August 10th must be construed with reference to the situation of the contracting parties, and we must take into consideration the motives that actuated the parties and the means used and the purposes sought to be accomplished. The parties were several hundred miles apart—one in the city of Savannah and the other in the city of Evansville. The last letter and the telegram and the quick communication made use of indicate that the appellees were desirous of making quick sales at prices named: *Kirwan v. Van Camp Canning Co.*, 12 Ind. App. 1.

Again the last letter and the telegram were in writing while the circular letter was printed.

It is a familiar rule that when a contract, or contracts, and other instruments, are partly written and partly printed, and a conflict arises between such portion, the written portions are entitled to a higher consideration than the printed portions in ascertaining the intention of the parties.

Conceding, without deciding, that the circular letter is not controlling, still the contracts were not binding²³ upon the appellees, for they never authorized them to be made in the name of the appellant.

If the appellees repudiated the contracts upon the ground that they had never been confirmed or accepted by them, this did not deprive them of the right to repudiate them upon another ground, especially if they learned of such cause subsequently to the first repudiation.

It may be said that the act of the broker in taking the con-

tracts in his own name was an act in the interest of his principals, and they ought not be permitted to take advantage of it. It is true that the appellant pledged his own credit for the benefit of the appellees, and it seems like a hardship to permit them to profit by an act done for their benefit. Whilst a seeming hardship results in this particular instance, yet the integrity of the rule that a broker cannot make a contract in his own name binding upon the principal, without his knowledge, must be upheld. If this rule should be broken down or varied, far greater injuries might result.

The claim for commissions is affected by the same infirmity that affects the claim for damages on account of the failure to fulfill the contracts. They both spring from the same source, from contracts which, under the circumstances averred, have no binding force upon the appellees.

It is true that the contracts resulted in furnishing the appellees with customers for their flour, but to say they are liable for commissions and are not liable for the damages is to draw two inconsistent deductions from the same premises.

Here again a hardship results, but it arises from the necessity of maintaining the integrity of the rule above stated.

24 Judgment reversed on the cross-errors, with instructions to sustain appellees' motion for judgment on the pleadings.

BROKERS—POWER TO MAKE CONTRACTS IN THEIR OWN NAME.—Strictly speaking, a broker is a mere "negotiator," "middleman," or "go between," never acting in his own name but in the names of those who employ him: Extended note to Walker v. Osgood, 98 Am. Dec. 171.

LEWIS v. HODAPP.

[14 INDIANA APPEALS, 111.]

PLEADING.—A special answer of non est factum closes the issues and neither requires, nor strictly speaking admits, a replication.

PLEADING—EVIDENCE.—Under a plea of non est factum to a suit on a note, evidence is admissible to show that the note was signed by the defendant or by another with full authority from him. Hence, a reply to such plea setting up such fact is not subject to demurrer.

NEGOTIABLE INSTRUMENTS—FORGERY—ESTOPPEL. A party who, after maturity of a note, with full knowledge that his name is attached thereto, admits his liability thereon and that he will stand good for it is not thereby estopped from claiming that his signature was forged, although the holder extends the time of payment, unless such extension is induced by such admissions.

J. B. Coles and G. B. Hall, for the appellant.

R. L. Davis and J. L. Davis, for the appellee.

¹¹¹ DAVIS, J. The appellant instituted this action, on a note, against one James Bailey, Jr., and the appellee ¹¹² Bailey made default. The appellee answered in two paragraphs: 1. General denial; 2. Non est factum.

The appellant replied to the answer of non est factum in two paragraphs. A demurrer was sustained to each paragraph of reply. These rulings are the basis of the only errors assigned in this court. The substance of the second paragraph of the reply is, that the note was signed by the appellee, or by said Bailey with full authority from him.

Ordinarily, a special answer of non est factum closes the issues and neither requires nor, strictly speaking, admits of a replication: *Webb v. Corbin*, 78 Ind. 403.

The substance of the answer is, that the appellee did not execute the note sued on and that his signature thereto was false and forged. Any facts tending to prove that the note was signed by him or by said Bailey with full authority from him were admissible in evidence under the plea of non est factum. No new issue was tendered by the second paragraph of the reply. Whether the appellee signed the note or authorized another to sign it for him was the issue tendered by the plea of non est factum. Therefore, in any event, there was no error in sustaining the demurrer to the second paragraph of the reply: *O'Donahue v. Creager*, 117 Ind. 272; *Ratliff v. Stretch*, 117 Ind. 527; *Mays v. Hedges*, 79 Ind. 288.

The theory of the first paragraph of the reply is, that appellee was estopped from pleading the defense set up in the answer of non est factum. A person whose name has been forged to a note may be estopped by his admission, upon which others may have changed their relations, from pleading the truth of the matter to their detriment: *Henry v. Heeb*, 114 Ind. 275; 5 Am. St. Rep. 613.

¹¹³ It is a familiar rule that an estoppel must be specially and strictly pleaded. No intendments are made in favor of a plea of estoppel: *Troyer v. Dyar*, 102 Ind. 396.

The substance of the first paragraph of the reply is, that after the maturity of the note the appellant asked the appellee about its payment, and that the appellee, with full knowledge that his name was on the note, admitted his liability thereon and that he would stand good for it, which statements and admissions the appellant believed; that said Bailey then owned property of

the value of one thousand dollars subject to execution out of which he could and would have secured the payment of the note, and that appellant, without any knowledge that appellee's signature was forged, extended to the time of payment, and that said Bailey has absconded and is insolvent.

There is no averment that the note was shown to the appellee, or that he admitted that he had signed the note or authorized anyone to sign it for him. It does not appear that the appellant changed his relations or invested any money on the strength of the alleged admissions of the appellee. All he claims is, that he did not sue upon the note, which he would have done had he been advised that appellee's name had been forged thereon. It is true that he avers in general terms that he extended the time of the payment of the note, but for how long is not stated, and neither does it appear that any extension was granted in reliance on the statements of the appellee.

Counsel for appellant say: "To constitute an estoppel by conduct there must be: 1. A representation or concealment of material facts; ¹¹⁴ 2. The representation must have been made with knowledge of the facts; 3. The party to whom it was made must have been ignorant of the matter; 4. It must have been made with the intention that the other party should act upon it; 5. The other party must have been induced to act upon it": *Hesford v. Johnson*, 74 Ind. 479.

In this case there was no representation of any material fact, and, if there was a concealment of a material fact, it is not alleged that such concealment was with the intention that the appellant should act upon it or that he was induced to act upon it. The fact that appellant believed the appellee would pay the note is not sufficient to justify the inference that he was induced thereby to extend the time of payment until Bailey became insolvent. If it appeared that appellee concealed the fact that he had not signed the note with the intention that the appellant should extend the time of payment of the note, and that such concealment had induced the appellant to so extend the time until Bailey became insolvent, a different question would be presented. In view of the rule that an estoppel must be specially and strictly pleaded, and that no intendments are made in favor of such plea, the trial court, in our opinion, did not err in sustaining the demurrer to the first paragraph of reply.

Judgment affirmed.

ESTOPPEL—ADMISSIONS—NEGOTIABLE INSTRUMENTS.—
If the maker of a note acknowledges to one intending to purchase it

that he has no defense, he precludes himself from afterward setting up any defense when sued on the note then existing within his knowledge: *Maury v. Coleman*, 24 Ala. 381; 60 Am. Dec. 478; *Weaver v. Lynch*, 25 Pa. St. 449; 64 Am. Dec. 713, and note; *Rose v. Teeple*, 16 Ind. 37; 79 Am. Dec. 403; *Brooks v. Martin*, 43 Ala. 360; 94 Am. Dec. 686. In an action on a promissory note against a maker whose signature was forged, it appeared that the defendant had said that the note was all right and that he would pay it, thereby inducing the plaintiff to omit to collect the note of the other maker who afterward became insolvent and absconded. It was held that the defendant was estopped from denying the execution of the note: *Hefner v. Dawson*, 63 Ill. 403; 14 Am. Rep. 123; *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106, and note. To the same effect see *Rudd v. Mathews*, 79 Ky. 479; 42 Am. Rep. 231, and note. See, also, the note to *Ray v. McMurtry*, 83 Am. Dec. 824.

CONLEE v. CLARK.

[14 INDIANA APPEALS, 206.]

MECHANICS' LIENS—LAST WORK DONE—TIME OF FILING LIEN.—Necessary work done by a contractor to correct his own mistake or to remedy a defect caused by his own negligence in the performance of his contract for which he is not entitled to make any charge may be considered as the last work done for the purpose of fixing the time from which the period allowed for filing the lien dates.

MECHANICS' LIENS AGAINST PURCHASER.—A third person who purchases property before the time for filing a mechanic's lien against it has expired, or who extends the time for filing such lien by labor performed at his special instance and request, may be required to pay such lien, although in purchasing he relies upon the representations of the vendor that the contractor's claims against the property have all been paid in full.

J. A. Pritchard, for the appellants.

J. T. Lecklider, for the appellees.

206 GAVIN, C. J. Appellees, the Clarks, sued to foreclose a mechanic's lien against property owned by the appellant Conlee, who answered by a general denial. The trial resulted in finding and judgment for appellees, over appellants' motion for new trial. The insufficiency of the evidence is the cause for new trial presented to us.

In the consideration of the evidence, it must be borne constantly in mind that we are not permitted to determine the weight of the evidence. We are simply permitted to say whether or not there is some evidence fairly sustaining every material fact, looking at the evidence in the light most favorable to the party who succeeded in the trial court. Where there is a conflict we must accept the conclusion of the trial court which decided thereon in favor of the appellees: *Currie Fertilizer Co. v. Byfield*, 9 Ind. App. 181.

One Smith owned the real estate in question. He was engaged in building a house thereon, and in March, 1893, made a contract with the Clarks to do certain plumbing, including putting in a bathtub (furnished by Smith) and watercloset for a specified sum. While the work was being done, about May 4th, Smith sold the property to appellant Conlee, who knew the work was not finished. By May 15th, the plumbers left the house, and appellees reported to Smith that the work was completed and asked about their money. On May 25th, appellant moved in, and upon lighting the fires found that the connections with the bathtub were not properly made, the hot water going to the closet box instead of to the tub. Appellant informed Smith of the fact, and he promised to see Clark. This Smith failed to do; appellant then called up Clerk by telephone, told him what was wrong, and asked him if he would fix it. He said he would, and sent a man up, who used a small ²⁰⁷ amount of material, and in a short time put the pipes in proper working condition. For this appellee made no charge and so informed the appellant. Both Smith and appellant believed the work to have been properly completed until the defect was discovered. Appellant and others testify that this last work was done on May 27th or 26th, but appellee and the workman swear it was on June 2d. On July 31st, appellees filed the notice of their lien. About July 5th, appellant settled with Smith, and paid him for the property.

In June, appellee informed appellant that the bill was unpaid. Appellant then asked Smith about it, but he asserted it was paid. The contract between Smith and appellant had been that the deed should be left in escrow and the money paid and deed delivered when receipts were furnished for all bills against the house. For some reason, however, appellant concluded to accept the deed, and relied upon Smith's statement that the bills either had been or would be paid—just what these representations were it is somewhat difficult to determine from the evidence. Appellant says at one place, "I only know this, that when I finally settled with Mr. Smith, Mr. Smith told me at that time that the money I gave him would pay all the claims."

Both the appellant and the appellee testify that the work was not properly completed without the additional labor. The appellant's testimony being:

"Q. Did you consider it was completed and in good condition before? A. I did when I took possession of the house.

"Q. At the time you telephoned? A. I did not consider it complete. As a matter of course, I did not."

Thus the evidence is direct that the contract was not in fact performed until these pipes were properly connected. ²⁰⁸ From the very nature of the case also, it seems to us that there was a substantial failure to fulfill the terms of the contract until this was done. It is true the work appeared to be complete until it was tested, but yet it was not in fact in condition to substantially accomplish the purpose desired until the proper connections were made.

Taking the evidence altogether, we think the court was justified in finding that the last work was done by appellees at appellants' request, in good faith, for the purpose of completing and fully performing their contract.

Appellants' counsel argue very earnestly, and with much force, that since this last work was done simply to correct appellees' own mistake, or to remedy the defect caused by their own negligence, and they neither made nor were entitled to make any charge therefor, it cannot be considered as fixing the time from which the period allowed for filing the lien dates.

The case of *Harrison v. Homeopathic Assn.*, 134 Pa. St. 558, 19 Am. St. Rep. 714, and possibly some other Pennsylvania cases do indeed sustain this view, but we cannot regard it as in consonance with the spirit of our statute, nor in harmony with the weight of authority. Counsel also lay stress upon the fact that appellant is an innocent purchaser. We do not see how he can be said to occupy that position.

When he purchased the property the work was manifestly incomplete. He was thereby apprised that it was liable to liens. When he paid for it, the time for filing a lien had not yet expired, even if it be dated from its apparent completion, as claimed by appellant. He had been expressly informed in June that the bill was not paid. If he relied upon Smith's statement to the contrary, he must abide by the results of his own misplaced ²⁰⁹ confidence. Moreover, if the time for filing the lien was extended by the last labor done, this was performed at his special instance and request, and he must be deemed chargeable with the knowledge of the legal consequences of his own act. The cases other than those in Pennsylvania relied upon by appellant do not, in our opinion, lend his position substantial support.

By *Noel v. Temple*, 12 Iowa, 276, it is decided that the house was actually completed without the additional work, which was a mere matter of form to enable the mechanic to gain a priority of lien, and, therefore, not to be regarded.

In *Dunn v. McKee*, 5 Smeed, 657, the opinion is quite meager. The house was completed in August, 1853, and the additional

work was repairing a leak in the roof in April, 1854. Whether done to save litigation merely, or to remedy a defect in the original execution of the work, does not appear. It was not shown to have been done in completion of the contract, and the decision of the court is, that the "conclusion is almost irresistible" that the work had been completed at a time prior to such repairs.

In *Flint v. Raymond*, 41 Conn. 513, the performance of three hours' work was purposely delayed for nine months (during which the rights of mortgagees accrued) "in order to keep alive their right to an encumbrance upon the property should Raymond fail to pay them after giving him such time for the purpose as they were led by a friendly regard to do." There was here a manifest perversion of the purpose of the statute. The court then holds that, "after a contract is substantially completed, there should be no unnecessary or unreasonable delay in fully completing the work to be done," and that the lien must be taken within sixty ²¹⁰ days from such substantial completion. In *Sanford v. Frost*, 41 Conn. 617, the unexplained delay in doing a "trifling amount" of work upon an apparently completed building was six months, and a bona fide purchaser had intervened. The above case was there followed.

In the later case of *Cole v. Uhl*, 46 Conn. 296, the delay was from December 1st to February 27th. The court held it distinguishable from both the above cases because the additional work was, although still small, greater in amount, and the time comparatively short, but more especially because the delay was by the original party to the contract.

In *Nichols v. Culver*, 51 Conn. 177, the house was substantially completed September 25th. The whole work came to two thousand seven hundred and fifty-six dollars. November 22d various little matters were done, worth in all fourteen dollars and thirteen cents. The time for filing lien was held to date from this last work, although it is said: "If it appeared that this work might have been added by the builder for the mere purpose of saving his lien, we should not feel disposed to sanction it; or if, after the work apparently closed by the putting on of the blinds in September, third parties had acquired an interest in good faith for a valuable consideration, the additional work might come within the principle of the decisions in 41 Connecticut, although the marked difference in the period of delay would occasion some hesitation," and the case is held to come within *Cole v. Uhl*, 46 Conn. 296.

Our statute, section 7527 of the Revised Statutes of 1894, gives

the lien upon filing with the recorder the proper notice "within sixty days after performing such labor or furnishing such material."

In *Stephenson v. Ballard*, 82 Ind. 87, the law is thus declared: "In the case at bar, the claim is for work ²¹¹ and also for materials in repairing a dwelling-house, and the suit is by the original contractors, who did the work and furnished the materials under one contract, and the notice was filed within sixty days after the last work was done, but not within sixty days after the materials were furnished; they were furnished two months before the last work done. In such a case upon such an entire contract, the statute is satisfied if the notice is filed, as it was in this case, within sixty days after the last work done." Substantially the same rule is announced in *Hamilton v. Naylor*, 72 Ind. 171.

In *Jeffersonville Water Supply Co. v. Riter*, 138 Ind. 170, a stand-pipe was so far completed as to be ready for testing and inspection in September, but it was not actually tested by filling with water until November, when leaks were found which were closed and the work finally received. The court, by Howard, J., held that the work was only then finished, the additional labor being in fact necessary and performed by the mechanic.

In *Worthen v. Cleveland*, 129 Mass. 570, we find a case closely analogous to that in hand. There one having a contract for the purchase of a lot to be carried out by April 1st, employed a mechanic to build a cellar wall, which he did during the fall and warranted it to stand through the winter, but it did not do so, and part was injured by frost, etc. In April, after the rights of the purchaser had been forfeited, the mechanic, to make good his warranty, restored the wall. The court decided that the time allowed for filing a lien would date from this last work, when it was done with the knowledge and consent and at the request of the owner of the fee, although, if done voluntarily, without such consent, it would not. There, as here, the owner against whom the lien was enforced did not make the original ²¹² contract for the work, nor did the original employer specifically direct or authorize the additional work to be done, but the one owning the fee at that time did so do.

In *Turner v. Wentworth*, 119 Mass. 459, a small amount of additional work was done at the owner's request seven or eight months after the other was performed. The court there says: "The evidence showed that the petitioners did some labor and furnished some materials used in the erection of the building, within the thirty days. If this was done in good faith, for

the purpose of completing their contract, and not colorably in order to revive their lien, the thirty days would begin to run from the time they thus performed labor and furnished materials." To substantially the same effect is *Hubbard v. Brown*, 8 Allen, 590.

McIntyre v. Trautner, 63 Cal. 429, was to foreclose a plumber's lien. About the middle of February the defendant objected that "the job was not satisfactory," and "that he would not accept it," etc., that "the pipes leaked," and requested plaintiff to go and "put them into proper shape." This was done April 25, 1878, and the lien filed within sixty days thereafter. The court said: "The defendant cannot be heard to say that the additional work done at his request to complete the contract was not a continuation of the previous work and done under the same contract. The lien was filed in time."

In *Gordon Hardware Co. v. San Francisco etc. R. R. Co.*, 86 Cal. 620, the work on the railroad under the contract was completed June 2d, but by the requirement of the engineer, two weeks' additional labor was applied to removing debris dumped on certain land contrary to the contract. Yet the time for filing the lien was held to date from the termination of this work not ²¹³ called for by the contract, but done simply to make good the party's neglect or failure to comply with the contract.

In *St. Louis etc. Stock Yards v. O'Reilly*, 85 Ill. 546, after possession was taken of the buildings, defects and omissions were discernible, which the contractors, by the architect's direction, supplied. It was held that the contracts could not be said to have been completed until this work was done, and that the time for filing notice then began to run.

We have not here an effort by the contractors to revive a right to a lien already lost, because when this work was done there was an undisputed right to file the lien. Nor was the work done by them voluntarily without the knowledge of the one most directly interested, merely for the purpose of extending the time for filing a lien, as in *Heath v. Tyler*, 44 Md. 312, but as we have already stated, the work was done in good faith, to complete and carry out the contract and at the request of the appellant, whose property was affected thereby; and under our statute and the decisions the time allowed for filing the lien dates from the last work done. We are unable to construe the cases cited by appellant, other than the Pennsylvania one, as deciding that the time begins to run from the date of the last item on the bill, for which a specific charge is made. The labor in question was required to complete the contract, and compensation therefor was

included in the gross sum for which appellees agreed to do the work.

The addition of the words, "June 2d, last labor performed," did not add anything material to, nor materially alter, the bill. The notice already stated in general terms that the last labor had been done within sixty days. The addition made added nothing to the legal effect, because the material fact was, whether or not ²¹⁴ the work was done within the sixty days; whether on one particular day or another did not matter.

With the view we have taken of the main question involved, we have not found it necessary to determine technical questions raised.

Judgment affirmed.

Reinhardt and Lotz, J. J., dissent.

MECHANIC'S LIEN, AGAINST PURCHASER.—A mechanic's lien is not affected by change of ownership during the progress of the building: *Gordon v. Torrey*, 14 N. J. Eq. 112; 82 Am. Dec. 273. The purchaser of a house for value actually paid is not affected by a statute which attempts to impose a lien thereon for work done by a mechanic prior to the purchase: *Bolton v. Johns*, 5 Pa. St. 145; 47 Am. Dec. 404. *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463, 34 Am. St. Rep. 408, holds that the lien is valid as against the assignee of property who takes with notice and assumes to pay the grantor's debts.

MADER v. COOL.

[14 INDIANA APPEALS, 239.]

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—If one is bound by an agreement not to do a certain thing at a certain place, a subsequent agreement to the same effect, made to procure the execution of a note, is not sufficient consideration therefor.

NEGOTIABLE INSTRUMENTS—PART FAILURE OF CONSIDERATION—RECOVERY.—If the consideration of a note fails in part only, there may be a recovery by the holder for the part as to which the consideration has not failed.

NEGOTIABLE INSTRUMENTS—EXECUTED GIFT—CONSIDERATION.—A note given without consideration, although payable in bank, cannot be regarded as an executed gift.

NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION—PAYMENT TO INNOCENT HOLDER.—Payment of a note by the maker to an innocent purchaser is not a voluntary payment such as will prevent recovery from the payee of the amount paid, if the note is without consideration, and this defense is lost by its transfer.

NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION—TRANSFER—LIABILITY OF PAYEE.—A payee of a note without consideration, who transfers it to an innocent purchaser, is liable to the maker for any loss accruing to him from such transfer.

Winfield & Taber, for the appellant.

Nelson & Myers, for the appellee.

200 GAVIN, C. J. Appellant sued appellee before a justice
200 of the peace, for a balance due upon a contract. Appellee answered by general denial, setoff and payment, he recovered in the justice's court, and also in the circuit court. The only errors argued here are presented by the motion for new trial.

There is evidence to sustain the following state of facts: Upon March 20, 1893, the parties were partners in the manufacture and sale of buggies, etc., at Logansport. Upon that day the partnership was dissolved, and all matters between the parties settled, appellee purchasing appellant's interest in the business. As a part of the settlement, appellee executed to appellant the contract sued on, calling for twelve hundred and sixty-one dollars in buggies. It was also a part of the terms of settlement that appellant should not sell the buggies at Logansport.

Upon the next day appellant expressed dissatisfaction with the settlement, declaring that he had lost money and wanted the matter fixed up, threatening that he would make trouble for appellee by talking to his men about him, thereby causing them to quit work, and that he would retail at Logansport the buggies which Cool had sold to him. After some discussion, Cool finally agreed to give him one hundred dollars in six months if he would go away and leave him alone and mind his own business, and to give a note for it if appellant would keep it until it was due. Thereupon the note was executed, and in a few days sold to one who seems to be conceded to have been an innocent purchaser for value before maturity, to whom appellee was compelled to pay the one hundred dollars. The sum thus paid appellee set off against the balance due appellant under the contract. Appellant did, in a few days after the taking of the note, talk disparagingly to appellee's men about him, although, so far as appears, without material effect, and did not sell the buggies at Logansport.

201 Taking the evidence of both Mader and Cool in connection with their conduct, we are of opinion that the jury was authorized to find that appellant did agree, at the time of the settlement, that he would not sell the buggies at Logansport, and that the sole consideration for the note executed on the next day was the agreement of appellant to go away from there and leave him alone, by which was meant not to sell the buggies at Logansport, and not to interfere with appellee's workmen. Appel-

lant claimed the note was given for borrowed money, but the jury evidently found against him on this proposition.

Appellant complains of the admission of evidence that, at the time appellee agreed to give the note, appellant agreed that he would keep it. This was, in fact, a part of the conversation occurring at the time of the execution of the note, closely and directly connected with it, so blended with that part of the conversation which showed the consideration of the note that, conceding it was not admissible as an independent fact, we are wholly unable to see, under the circumstances of this case, how it could have been harmful to appellant, nor have appellant's counsel in their brief indicated to us how he was injured thereby.

The appellant asked that certain instructions be given directing the jury that if part of the consideration of the one hundred dollar note was appellant's agreement not to sell the buggies in Logansport, this was a valid agreement, and, if carried out, furnished some consideration for the note, so that there was not a total failure or want of consideration for the note. Assuming, without deciding, that such an agreement, disconnected with any sale of business or of the goods themselves, was valid, the instructions are, nevertheless, faulty in this, that they wholly ignore and fail to negative the proposition that ³⁰² appellant was at this time already bound to do this very thing, as to which there was some evidence. If appellant was in fact bound by his agreement of the day before not to sell these buggies at Logansport, then his agreement to the same effect, made to procure the execution of the note, would not be a sufficient consideration to sustain the note: *Beaver v. Fulp*, 136 Ind. 595; *Shortle v. Terre Haute etc. R. R. Co.*, 131 Ind. 338; *Henes v. Henes*, 5 Ind. App. 100.

The modifications of one of appellant's instructions were not such as injured him. While the latter part of the modification is not most accurately expressed, still, we do not believe the jury could have been misled by it. Taking the instruction altogether, it was more favorable to appellant than he was, for the reasons above given, entitled to ask. This modification only laid down a general principle. It could not be fairly construed to mean that if the consideration only partly failed, appellee could recover for that part which had failed. On the contrary, what was intended evidently was, that where the consideration of a note fails in part only, there may be recovery by the holder of that part as to which the consideration has not failed.

The instructions given have been set out by counsel, and there

have been some incidental references to them, but no points of objection thereto have been made and argued. We have not, therefore, taken them up.

We cannot accede to appellant's proposition that because the note was payable in bank it must, if given without any consideration, be regarded as an executed gift. Nor can we agree that appellee's payment to an innocent holder can be deemed a voluntary payment and the money thus paid not recoverable for that reason. The note having been executed to appellant without any sufficient consideration therefor, appellee would have ³⁰⁸ had to it a good defense in his hands. By the transfer of the note to an innocent purchaser, this defense was lost, and appellee compelled to pay the note. Appellant thereupon became liable to appellee in a proper action for the loss thus accruing to him: *Richardson v. Richardson*, 148 Ill. 563; *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 374; 45 Am. St. Rep. 727; *Smith v. Cuff*, 6 Maule & S. 160; *Horton v. Riley*, 11 Mees. & W. *492; *Farnham v. Benedict*, 107 N. Y. 159; *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142; *Baker v. Brem*, 103 N. C. 72.

Judgment affirmed.

Ross, J., absent.

NEGOTIABLE INSTRUMENTS.—PARTIAL FAILURE OF CONSIDERATION of a promissory note sued on is a good defense pro tanto against the payee or one having only his rights: *Peterson v. Johnson*, 22 Wis. 21; 94 Am. Dec. 581, and note. See, also, the note to *Allen v. Furbish*, 64 Am. Dec. 91.

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—BONA FIDE PURCHASERS.—Failure in whole or in part of the consideration for a promissory note after a bona fide assignment before maturity is not available as a defense in an action by the assignee against the maker: *Splivallo v. Patten*, 88 Cal. 138; 99 Am. Dec. 858.

BALTIMORE, OHIO AND CHICAGO RAILWAY COMPANY v. SCHOLES.

[14 INDIANA APPEALS, 524.]

CONTRACTS—ESTIMATES OF ENGINEER—CONCLUSIVENESS.—Parties cannot, by an agreement in advance, make conclusive the estimate of an engineer, but they may provide that such estimate shall be taken as prima facie true and correct.

EVIDENCE—ENGINEER'S ESTIMATE—ATTACK FOR FRAUD OR MISTAKE.—An engineer's estimate is presumed to be correct, but is subject to attack for fraud or mistake, and the burden of proof is upon the attacking party.

CONTRACTS—PLACE WHERE MADE—PRESUMPTION. A contract is presumed to have been made in the state in which an action is brought thereon.

EVIDENCE OF FRAUD OR MISTAKE—BURDEN OF PROOF.—A party having the burden of proof to show fraud or mistake must show it by a preponderance of the evidence, but he is not required to "establish it beyond any doubt."

J. H. Collins, for the appellant.

L. M. Ninde & Sons, for the appellee.

525 REINHARD, J. Action by the appellee against the appellant, on an account for work and labor in the construction of a railroad yard at Chicago Junction, Ohio, on which a balance of three thousand dollars is alleged to be due. Subsequently, another paragraph of complaint was added. This paragraph declared upon a special contract containing, among others, the following provision:

"And it is expressly understood that the monthly and final estimates of said engineer, as to the quantity, character, and value of the work, shall be conclusive between the parties to this contract (the former for the time being and the latter for all time) without further recourse or appeal; the monthly estimates of the engineer being, however, subject to correction by him in any subsequent monthly or in his final estimates, for the reason that the monthly or current estimates, being merely made out as a basis for payment on account, will necessarily be only approximately correct, pains being taken, however, to make them as accurate as possible.

"It is further covenanted and agreed that all extra work required and not embraced under items and prices above set out shall be done by the contractor at the estimate of the engineer, and said engineer shall embody in each monthly estimate a bill for the same, made out as correctly as possible, for the month preceding; these bills shall be final for such months, and the acceptance of the estimates by the said contractor shall be deemed **526** and taken as waiving any further claims for or on account of extra work done up to that time.

"It is mutually agreed and distinctly understood that the decision of the engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and said first party does hereby waive any right of action, suit, or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of the said engineer shall, in the nature of an award, be final and conclusive of the rights and claims of said parties."

The appellant demurred to each paragraph of the complaint, the demurrer was overruled and the appellant excepted. The

appellant answered in six paragraphs, viz: 1. The general denial; 2. Payment; 3. That before the commencement of the action the plaintiff sold, transferred, and assigned to one W. B. Keefer all claims and demands which he might have against the defendant and particularly the claim set out in the plaintiff's complaint; 4 and 5. A written assignment of the claim to W. B. Keefer; 6. That on the fourth day of March, 1891, the plaintiff and defendant mutually settled all matters of difference between them and every demand and claim of any and every kind and nature whatsoever of the one against the other, and that the plaintiff acquitted the defendant of any and all liability to him respecting said claim, in consideration of a sum named.

The appellee replied to the sixth paragraph of the answer admitting that the defendant paid him the sum of fourteen hundred and fifty-two dollars and seventy cents, but he further averred that after the completion ⁵²⁷ of the work the defendant wrongfully failed and neglected to make full, true, and complete estimates for the same, and that on account of the delay, neglect, and refusal in this regard, and his poverty and inability to procure money with which to pay his debts incurred in the construction of the work, suits were brought against him and the money due him from defendant was garnished and tied up, and that, taking advantage of the situation produced by this conduct of the defendant, the latter through its agents and chief engineer proposed to pay the plaintiff fourteen hundred and fifty-two dollars and seventy cents, and further proposed that if plaintiff would accept said money and sign a receipt therefor, it would make further true, full, and complete estimates of said work, and would pay plaintiff anything that might be justly due and owing to him, and, in consideration of said agreement, he accepted said money and gave his receipt therefor, but that the defendant failed and refused to make any further full, true, and correct estimates. It is further averred that, at the time plaintiff accepted this money and made this settlement, he protested that there was more due him, and that under his protest and the conditions averred, he accepted the money and signed the receipt.

There was a demurrer to this reply which was overruled and an exception reserved. The cause was submitted for trial to the court, and, upon request of parties, there was a special finding of facts together with the court's conclusions of law thereon. The appellant excepted to the conclusions.

It will be noticed that the contract set out with the second paragraph of complaint provides that the work which the appel-

lee agreed to perform for the appellant was to be done under the supervision of the appellant's engineer; that the latter was to make estimates of the ⁵²⁸ work done as the same progressed, and that, upon completion of the whole, the engineer was to inspect it, and payment was to be made according to the estimates of said engineer; and that his final estimates as to the quality, character, and value of said work were to be conclusive between the parties "without further recourse to appeal."

The question is presented to us in various ways, whether in view of such provision the appellee was entitled to recover anything in the present action, it appearing that by the estimates of the engineer there was nothing due the appellee.

The parties may provide that the estimates shall be made by the company's engineer, and that such estimates shall be taken as true and correct: *Kistler v. Indianapolis etc. R. R. Co.*, 88 Ind. 461; *McCoy v. Able*, 131 Ind. 417; *Board etc. v. Newlin*, 132 Ind. 27. But, at the same time, the estimates made by the engineer are not conclusive. They are only *prima facie* correct, and may be attacked either for fraud or mistake.

As was said by Elliott, C. J., in *McCoy v. Able*, 131 Ind. 423: "We cannot agree with counsel that the engineer's estimate is conclusive, for we understand it to be settled by our decisions that parties cannot, by an agreement in advance, oust the jurisdiction of the courts and make conclusive the estimate of an engineer or other person. . . . But while we do not regard the estimate as conclusive, we do regard it as *prima facie* correct": See, also, *Bauer v. Samson Lodge K. of P.*, 102 Ind. 262; *Supreme Council etc. v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

The engineer's estimate, however, will be presumed correct until the contrary appears. The burden rested upon the appellee to allege and show that there was ⁵²⁹ either fraud or mistake in the estimates made by the engineer: *McCoy v. Able*, 131 Ind. 417.

It was expressly averred in the second paragraph of the complaint that the estimates of the engineer were erroneous, and the particulars in which they were so stated, and that a true final estimate would have shown appellee to be entitled to the additional sum now claimed by him. It was also averred that appellee never accepted said estimates, and that although he received money in payment of said work and signed receipts therefor, he did so under protest, claiming that the same were not the full amounts due him. There are other averments, which, if true, together with those we have recited, entitle the appellee to a recovery.

If the estimates of the engineer were in fact erroneous and the appellee could show this, we see no good reason why they should stand. In *Louisville etc. Ry. Co. v. Donnegan*, 111 Ind. 179, the court, on page 188, said: "The fifth finding was, that owing to the negligence, carelessness, incompetency, and mistakes of the company's engineers, the statements of the work were in many instances incorrect. That finding is entirely sufficient to show that the estimates made by the company's engineers were incorrect, and to entitle appellees to recover what was due them, notwithstanding such estimates."

It may be that the estimates are not subject to any collateral attack, but, if this be true, the second paragraph of complaint amounts to a direct proceeding to set them aside. The special findings fully support the averments of the second paragraph of the complaint.

It is insisted, however, that "it does not appear anywhere in the pleadings that the Baltimore and Ohio and Chicago Railroad Company was ever a railroad corporation ⁵³⁰ other than that which its name indicated." From this and the further fact that the work was done in Ohio, it is argued that "if there is any presumption with reference to the place of contract, it is that it was made in the state of Ohio. An Ohio corporation would certainly not go to the state of Indiana for the purpose of making a contract, and it did not do so." Hence, it is urged that the contract must be construed according to the laws of Ohio, etc.

A contract sued upon in a court in this state will be presumed to have been made here, unless the contrary is made to appear: *Rose v. Thames Bank*, 15 Ind. 292; *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258.

The rule contended for by appellant's counsel, "that fraud or mistake must be established beyond any doubt," does not obtain in Indiana. In civil actions of this character, under our practice, the party having the burden is required to prove the issues devolving upon him by a preponderance of the evidence. When he has done that, he has satisfied the law. Fraud and mistakes are questions of fact and must be proved like any other fact. If the appellee succeeded in establishing the mistakes alleged, by a preponderance of the evidence, it was sufficient. The court having found in his favor on these questions, and there being evidence to sustain the finding, we cannot undertake to weigh such evidence and decide where the preponderance lies.

Judgment affirmed.

Architects' Certificates and Engineers' Estimates.

Architects' Certificates—Effect of.—An agreement in a building contract that there shall be no liability to pay for the work done, except upon an architect's certificate, is valid: *Bentley v. Davidson*, 74 Wis. 420; *Munday v. Louisville etc. R. R. Co.*, 67 Fed. Rep. 633; and when such a provision is inserted in the contract, the certificate must be substantially such as the contract calls for, or it will not authorize a recovery: *Michaelis v. Wolf*, 136 Ill. 68; *Roy v. Boteler*, 40 Mo. App. 213.

A stipulation in a building contract that payment shall be made on the estimate and certificate of the architect is a condition precedent and should be pleaded, and its performance alleged and proved, or a valid and reasonable excuse for nonperformance shown: *Roy v. Boteler*, 40 Mo. App. 213. When provision is made in a building contract for the payment of the price, or a portion or portions of such price, upon the certificate or certificates of the architect in charge of the construction of the building, the obtaining or the presentation of such certificate or certificates is a condition precedent to the right to require payment, and such condition must be strictly complied with, or a good and sufficient excuse shown: *Michaelis v. Wolf*, 136 Ill. 68; *Arnold v. Bournique*, 144 Ill. 132; 36 Am. St. Rep. 419; *Davis v. Badders*, 95 Ala. 348; *Fowler v. Deakman*, 84 Ill. 180; *Adams v. Mayor*, 4 Duer, 295; *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267. No action can be maintained upon the contract in the absence of such certificate, unless it has been demanded from the architect and fraudulently, arbitrarily, or capriciously withheld, or has been withheld by a clear mistake: *Wendt v. Vogel*, 87 Wis. 462; *Arnold v. Bournique*, 144 Ill. 132; 36 Am. St. Rep. 419; *Packard v. Van Scholck*, 58 Ill. 79; *Bradner v. Roffsell*, 57 N. J. L. 412. Such a mistake as authorizes a recovery without the certificate in such a case is unintentional misapprehension or ignorance of some material fact and must be clearly shown by the evidence, and must be so gross as to be equivalent in effect to dishonest, fraudulent, or arbitrary action: *Wendt v. Vogel*, 87 Wis. 462.

If, after the work has been substantially completed, the architect refuses to give a certificate, and such refusal is based on unreasonable requirements, the failure to obtain the certificate does not bar a recovery by the contractor, although its procurement is by the contract made a condition precedent to recovery: *Crouch v. Gutmann*, 134 N. Y. 45; 30 Am. St. Rep. 608; *Thomas v. Stewart*, 132 N. Y. 580. If the contract between parties for the erection of a building provides that payment is to be made upon the presentation of a certificate signed by the architect, his arbitrary refusal to act upon matters left to his decision under the contract dispenses with the necessity for procuring a certificate before an action is brought to recover payment: *Frost v. Rand*, 51 Ill. App. 276; *Flaherty v. Miner*, 123 N. Y. 382.

If the certificate required is arbitrarily and dishonestly withheld, the builder may recover on showing that fact, and that he has performed the contract according to its terms: *Bentley v. Davidson*, 74 Wis. 420. If, without fault of the contractor, the architect refuses

his certificate, he cannot thereby prevent a recovery by the contractor for damages suffered by him from a breach of the contract by the employer: *Linch v. Paris Lumber etc. Co.*, 80 Tex. 23. If a party contracts to furnish stone to erect a building, with reference to stone from a particular quarry to be used and the superintendent selected by the parties, and upon whose certificate payment is to be made, recommends it, and the contractor uses it, and receives certificates after using it on part of the building, such superintendent cannot, by capriciously or fraudulently refusing to furnish the contractor with a certificate that he has completed his contract, on the pretext that the stone used is not of the proper kind, deprive the contractor of the price he was to receive for furnishing the stone: *Badger v. Kerber*, 61 Ill. 328. When the contract provides that payments shall be made only upon certificates of the architect that the work has been done in a good and workmanlike manner, the fact that payments have been made, from time to time, without requiring strict performance of such condition is not a waiver thereof: *Brown v. Winehill*, 3 Wash. 525. Under a building contract providing for a final certificate from the superintendent as a condition precedent to the final settlement of matters arising under the contract, any act of the owner which prevents the contractor from obtaining such certificate relieves the contractor from the duty of procuring one: *Haunroth v. Peters*, 50 Ill. App. 366. If there remains any material part of the work which can reasonably be done in accordance with the contract, the architect may rightfully withhold his certificate until the contractor has completed such work, and, so long as he can rightfully withhold his certificate, there can be no recovery: *Craig v. Geddis*, 4 Wash. 390.

If a building contract merely authorizes an architect to certify that the contract is performed to his satisfaction, his certificate that it is not so performed because of certain defects in the work, has no binding effect upon the contracting parties: *Mackinson v. Conlon*, 56 N. J. L. 564.

If the contract makes an architect's certificate a condition precedent to the payment of several installments upon the work, an allegation in a complaint in an action brought to enforce a mechanic's lien, that the complainant demanded such certificates of the architect, and that the latter, acting in furtherance of a conspiracy to cheat and defraud complainant, fraudulently withheld such certificates, together with an allegation claiming compliance with the contract in all other respects, is a sufficient charge of fraud, and, if sustained by evidence, is sufficient to relieve the contractor of the necessity of procuring such certificates: *Michaels v. Wolf*, 138 Ill. 68. If the contract stipulates for payment by the owner, in consideration of performance by the contractor, in installments, provided that in each case an architect's certificate shall be obtained that the respective payments have been reached and that the work has been done, such certificate is not requisite to entitle a subcontractor to enforce a mechanic's lien for material furnished for the building, in a case where the owner has completed the work, according to the contract, upon the contractor's failure to perform: *Campbell v. Coon*,

149 N. Y. 558. If the contract requires that plaintiff, claiming the last installment of the agreed price, shall procure the architect's certificate as to the full and proper completion of the building, he may recover under the common counts for work done and material furnished, on proof of its acceptance and its value without obtaining or presenting such certificate: *Davis v. Badders*, 95 Ala. 348.

An architect is liable in damages for negligent and erroneous statements to his employer as to the value of the work done by the builder under which the latter is overpaid, if such statements are independent of the certificate called for by the contract between the employer and the builder: *Corey v. Eastman*, 166 Mass. 279; 55 Am. St. Rep. 401.

If an architect who is acting as arbitrator accepts a fee as a reward for giving a final certificate, such certificate is thereby rendered void: *Haunroth v. Peters*, 50 Ill. App. 366.

Conclusiveness of Certificate.—A provision in a construction contract that the engineer or architect of the owner shall finally determine, as between the contractor and the owner, what work has been done, and the amount to be paid for it, is valid, and should be enforced in the absence of fraud or palpable mistake: *Mundy v. Louisville etc. R. R. Co.*, 67 Fed. Rep. 633; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Wilcox v. Stephenson*, 30 Fla. 377. If the parties to a building contract agree that the architect shall pass upon the work and certify upon the payments to be made, his decision, as shown by such certificate, is binding and conclusive upon them, and can be attacked only for fraud or evident mistake: *Hennessey v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267; *Wilcox v. Stephenson*, 30 Fla. 377; *Wyckoff v. Meyers*, 44 N. Y. 143; *Kennedy v. Poor*, 151 Pa. St. 472; *Downey v. O'Donnell*, 86 Ill. 49; 92 Ill. 559; *Snell v. Brown*, 71 Ill. 133; *Coey v. Lehman*, 79 Ill. 173; *Anderson v. Imhoff*, 34 Neb. 335. In the absence of fraud or palpable mistake, such certificate properly given is conclusive upon the parties, and entitles the contractor to recover without any other proof of the actual performance of the work: *Adams v. Mayor*, 4 Duer, 295; *Wyckoff v. Meyers*, 44 N. Y. 143.

An architect's certificate under such a provision in a building contract can be overcome by proof to the effect that it is the result of fraud, caprice, or malice, and is without foundation in fact; but the party who attacks it has the burden of proof to show this: *Eldridge v. Fuhr*, 59 Mo. App. 44.

Engineer's Estimates and Certificates are governed by the same rules as control architects' certificates, and an agreement in a construction contract providing that estimates of the quantity or quality of work done thereunder shall be referred to an engineer, whose determination of such question shall be conclusive upon the parties is valid, and when an award has been made thereunder in good faith it is binding upon the parties: *Ross v. McArthur*, 85 Iowa, 203; *McNamara v. Harrison*, 81 Iowa, 486; *Ogden v. United States*, 60 Fed. Rep. 725; *Langdon v. Northfield*, 42 Minn. 464. An award made thereunder in good faith under such an agreement is conclusive, though the engineer making it is a stockholder in a company which

is one of the contracting parties: *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463; 34 Am. St. Rep. 403. A stipulation in a construction contract that it shall be executed under the direction of a certain engineer, by whose measurements and calculations the amount of work performed shall be determined, and whose determination shall be final, is valid and binding, and such determination, when made in good faith, is conclusive upon the parties, and can be attacked or impeached only for fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment: *Langdon v. Northfield*, 42 Minn. 464; *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463; 34 Am. St. Rep. 403; *Mackler v. Mississippi etc. R. R. Co.*, 62 Mo. App. 677; *Matter of Freel*, 148 N. Y. 165; *Faunce v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519; *Lake View v. MacRitchie*, 134 Ill. 203; *Sweet v. Morrison*, 116 N. Y. 19; 15 Am. St. Rep. 376; *Chicago etc. Ry. Co. v. Price*, 138 U. S. 185; *Lewis v. Chicago etc. Ry. Co.*, 49 Fed. Rep. 708. It has, however, been decided in Indiana that while the estimate of an engineer is prima facie correct, and that the burden is on the person attacking it to show fraud or mistake, such an estimate is not conclusive and cannot be made so by an agreement of the parties in advance. "We understand it to be well settled by our decisions that parties cannot, in advance, oust the jurisdiction of the courts and make conclusive the estimate of an engineer or other person": *McCoy v. Able*, 131 Ind. 417-422. A provision in a construction contract that, when the work is completed there shall be a final estimate made by the engineer of the quantity, quality, and value of the work, and the balance after deducting monthly payments, and, on the contractor's giving a release, shall be paid in full, is not an agreement that the engineer's estimate shall be conclusive: *Central Trust Co. v. Louisville etc. Ry. Co.*, 70 Fed. Rep. 282. But, even when such estimates are made conclusive by stipulation, the courts will relieve against mistakes in measurements and calculations appearing upon the face of the estimates, or clearly proven, or from a neglect to measure or estimate any particular part of the work, or from wrong constructions put upon the provisions of the contract by the engineer; but the courts will not relieve against alleged mistakes in determining the kind of materials used, nor against slight discrepancies in measurements: *Lewis v. Chicago etc. Ry. Co.*, 49 Fed. Rep. 708. Although the contract between the parties stipulates that in all questions connected with certain estimates required, and the amounts payable under the contract, the decision of the engineer of one of the parties shall be final and conclusive, yet, if the conduct of such engineer is fraudulent, or he is guilty of a mistake so gross as to amount to fraud on the rights of the opposing party, the latter is not bound by his estimates, and may maintain his action on the contract to recover the true amount due him: *Norfolk etc. R. R. Co. v. Mills*, 91 Va. 613. And the fact that the engineer is in the employ of one of the parties does not commit him to the consequences of the engineer's misconduct in making estimates resulting from collusion with the other party while acting as arbiter for both parties: *Gonder v. Berlin Branch R. R. Co.*, 171 Pa. St. 492. In an action to recover for work done under a construction

contract, which stipulates that the amount of work shall be determined by the measurements and certificate of a certain engineer, which shall be conclusive, such estimate and certificate may be impeached for fraud or gross mistake implying bad faith, and, on a quantum meruit, the plaintiff may recover the value of the work done: *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463; 34 Am. St. Rep. 403. Or upon proof that the engineer, after repeated requests, has neglected and refused to sign the final estimate, though present while the work was in progress, the contractor may, upon proof of the construction of the work according to the contract, recover the whole or the balance of the contract price then due, without the production of the engineer's estimate or certificate of the completion of the work: *Ooon v. Citizens' Water Co.*, 152 Pa. St. 644; *Williams v. Chicago etc. Ry. Co.*, 112 Mo. 463; 34 Am. St. Rep. 403.

FRAUD—EVIDENCE TO PROVE.—If the facts and circumstances surrounding the case and directly proved are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires: *Williams v. Harris*, 4 S. Dak. 22; 46 Am. St. Rep. 753. See, also, the notes to *Tuteur v. Chase*, 14 Am. St. Rep. 579, and *Brown v. Mitchell*, 11 Am. St. Rep. 759.

FORT v. WELLS.

[14 INDIANA APPEALS, 531.]

CONVERSION—BROKERS BUYING AND SELLING STOLEN PROPERTY.—A broker who, in good faith, sells stolen property for a thief on commission, and a broker who acts in good faith on commission for the buyer of such property, are both liable to the true owner thereof for conversion.

Kealing & Hugg and E. E. Stevenson, for the appellants.

S. Ashby, for the appellee.

531 DAVIS, J. The appellee, Oliver Wells, brought this action, September 18, 1893, in the Marion superior court, against the appellants John W. Fort, William M. Johnston, E. Nathan Wilkinson, Thomas B. Wilkinson, partners under the firm name of Fort, Johnston & Co. (by which firm name said appellants will be called in this opinion), and the appellants Thomas A. Jeffrey, Alonzo Powell and John Powell doing business under the firm name and style of Jeffrey, Powell & Co. (by which firm name said appellants will be called in this opinion), for the wrongful and unlawful conversion of thirteen head of two year old steers.

Fort, Johnston & Co. were general commission salesmen of livestock. Jeffrey, Powell & Co. were cattle dealers engaged in buying stock for others. It appears that a man under the assumed

name of J. W. French, on or about August 8, 1893, stole the cattle from the appellee and drove them to the Union Stock Yards at West Indianapolia. Fort, Johnston & Co., acting as commission merchants for him in the sale, sold the cattle to Jeffrey, Powell & Co., acting as commission merchants ⁵³² in the purchase for parties in Pennsylvania. Fort, Johnston & Co., at the time of the sale, paid said French by their firm check, four hundred and fifty-two dollars and eighty-six cents, for the cattle. Afterward on the same day or next, Jeffrey, Powell & Co. paid Fort, Johnston & Co. by their firm check, four hundred and sixty-one dollars and ninety-six cents for the cattle. The commission of Fort, Johnston & Co. for making the sale was six dollars and fifty cents. The other expenses appear to have been two dollars and sixty cents. Jeffrey, Powell & Co. shipped the cattle to the parties in Pennsylvania, for whom they purchased them, who afterward paid said firm the purchase price for the cattle, together with a commission at the rate of ten dollars a car for buying the cattle. Judgment was rendered against all of said appellants.

Each of said firms has separately assigned as error that the court erred in overruling the motion of said appellants for a new trial. The reasons assigned in the motion for a new trial are: 1. That the verdict of the jury is not sustained by sufficient evidence; 2. That the verdict of the jury is contrary to law; 3. The admission by the trial court of hearsay evidence on the part of the appellee.

Fort, Johnston & Co. in their separate motion also assign the additional reasons: 1. That the damages assessed by the jury are excessive; 2. That the court erred in giving certain instructions; 3. That the court erred in refusing to give certain instructions. The appellee contends that under the decision in *De Hart v. Board etc.*, 143 Ind. 363, the evidence is not in the record.

The assignment of errors does not contain the names ⁵³³ of the appellants in full. The Christian names of two of the appellants are omitted: *Brown v. Trexler*, 132 Ind. 106.

Waiving these questions, however, and assuming that the evidence is in the record, we have read the evidence in the light of the argument of counsel for appellants.

We are satisfied that if the appellee was entitled to recover, the damages assessed are not excessive; that there was no error in either the giving or the refusal of instructions; and that the admission of the alleged hearsay testimony was in any event harmless.

The only meretorious question presented on this appeal, in the view we take of the case, is whether the appellants Fort, Johnston & Co., who acted as brokers in selling the cattle for French, and paid to him the proceeds with no knowledge that he had stolen them, and whether the appellants Jeffrey, Powell & Co., who acted as brokers in buying the cattle for other parties to whom they shipped them, are liable for the conversion of the cattle to appellee.

In *Alexander v. Schwackhamer*, 105 Ind. 81, 55 Am. Rep. 180, the supreme court, by Judge Mitchell, quotes with approval from *Hills v. Snell*, 104 Mass. 173, 6 Am. Rep. 216, as follows: "Even an auctioneer or broker, who sells property for one who has no title, and pays over to his principal the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner": *Schearer v. Evans*, 89 Ind. 400; *Breckinridge v. McAfee*, 54 Ind. 141; *Hollins v. Fowler*, L. R. 7 H. L. Cas. 575.

It is clear that Fort, Johnston & Co. acted in good faith in selling appellee's cattle for the thief, and that Jeffrey, Powell & Co. acted in good faith in buying the cattle for and shipping them to parties in Pennsylvania. ⁵³⁴ Each of said firms received a broker's commission and not a trade profit on the transaction.

In a recent case we quoted with approval from *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184, the following: "The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it": *Kidder v. Biddle*, 13 Ind. App. 653.

The ignorance of appellants as to the rights of the appellee was not occasioned by anything said or done by the appellee. The appellants, by their acts, assumed an unauthorized dominion and control over the appellee's cattle. The fact that they were acting for others cannot avail them: *Kidder v. Biddle*, 13 Ind. App. 653.

There is no error in the record.

Judgment affirmed.

TROVER—CONVERSION—SELLING STOLEN ARTICLE BY BROKER.—A stockbroker who sells certificates of stock received by him, for sale, from one who stole them, is guilty of a conversion of them and is liable to the true owner of the stock for its value, although the thief at the time he delivered to him the stock, repre-

sented himself to be its owner, and the broker, in good faith and without notice of the theft, sold the stock and paid to the thief the proceeds of the sale: *Swim v. Wilson*, 90 Cal. 126; 25 Am. St. Rep. 110, and note.

PRUDENTIAL INSURANCE COMPANY v. YOUNG.

[14 INDIANA APPEALS, 560.]

INSURANCE—LIFE—ASSIGNMENT OF.—Although a policy of life insurance provides that it is payable to the “executor or administrator” of the insured, reserving the right to the insurer, at its option, to pay the amount of the insurance to any person appearing to the insurer to be entitled thereto by reason of having incurred expense in the burial of the insured, the policy may be assigned by the latter and the amount thereof recovered by the assignee against the insurer, unless the latter has exercised the option thus reserved.

APPELLATE PRACTICE—BILL OF EXCEPTIONS.—Unless the record on appeal shows affirmatively that the bill of exceptions was filed after it was signed by the court, it does not become a part of the record and cannot properly be embodied in the transcript or considered on appeal.

J. E. Williamson, for the appellant.

Gilchrist & De Bruler, for the appellee.

⁵⁶¹ **ROSS, J.** The appellee sued and recovered judgment against the appellant upon two policies of insurance issued by appellant upon the life of Flodoroda Young, the son of appellee.

By each of the policies of insurance the appellant promises to pay to the “executor or administrator” of the insured within twenty-four hours after satisfactory proof of his death, the sum of one hundred and forty dollars, “unless settlement shall be made under the provisions of article second,” which reads as follows: “The company may pay the sum of money insured hereby to any relative by blood, or connection by marriage, of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that ⁵⁶² all claims under this policy have been fully satisfied.”

It is alleged in the complaint that the insured designated the appellee as the beneficiary and directed the appellant to pay the

amount of said policies to her upon his death. The application or request in which the insured designated the appellee as the beneficiary was made upon a printed form prepared and furnished by the appellant, in which it was provided that nothing therein contained should in any manner vary any of the provisions, agreements, or conditions contained in the policy, and that appellant might, "at its option, pay said benefit according to the said proviso, or article second, anything herein to the contrary notwithstanding." A copy of this application or request was filed with the complaint.

The appellant insists that neither paragraph of the complaint states a cause of action in appellee; that the policies on their face designate the executor or administrator of the insured as the beneficiary, and that the insured could not change the beneficiary designated in the policies without the knowledge or consent of the appellant; that the complaint fails to allege that such consent was given or that appellant had been notified of the change in beneficiaries. And further that, even had notice of the change been given, it was optional with appellant as to whether or not it would recognize the change and pay the new beneficiary named, or make payment as the policy provided under "article second."

It is well settled in this state that the beneficiary named in an ordinary policy of insurance, issued by a regular life insurance company, cannot be changed without the consent of such beneficiary: *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Presbyterian etc. Assur. Fund v. Allen*, 106 ⁵⁰³ Ind. 593; *Kline v. National Ben. Assn.*, 111 Ind. 462; 60 Am. Rep. 703.

✓ The policies sued on did not designate a beneficiary in whom the right to benefits under the policy vested. The insured had neither an executor nor an administrator, and could not have until after his death. There was no one, therefore, in whom title to the policy could vest unless it vested in some one of the persons referred to in article second. We think no right vested in the persons referred to in this article, if for no other reason than that their right depended upon the willingness of the appellant to recognize them, which it was not bound to do. But it is plain that the beneficiary designated was the insured's estate, and was the property of his estate and if he had died without changing the beneficiary it could have been collected as part of the assets of the estate and used to pay his debts. In fact the policies were made payable to the insured himself, and the rights

thereunder accrued to him, and as his property he had a right to sell, assign, or transfer them the same as any other chose in action, subject, however, to the restriction which the law places around the transfer of policies of insurance on the lives of persons. When the insured designated the appellee as the beneficiary, he, in effect, assigned and transferred to her his rights in the policies, and they vested in her at once. What effect a payment in accordance with the provision of article second would have upon appellee's right of recovery is not presented, hence we decide nothing with reference to that question. The complaint is sufficient to withstand a demurrer for want of facts.

The other questions urged by appellant for a reversal of the judgment of the court below require an examination of the evidence, which is not properly in the record. Unless the record shows affirmatively that a bill of ~~504~~ exceptions was filed after it was signed by the court, it does not become a part of the record and cannot properly be embodied in a transcript on appeal.

It appears from the transcript of the record and proceedings of the court below that on the sixth day of June, 1894, the same being the third judicial day of the June term, 1894, of the said court, the appellant's motion for a new trial was overruled, an appeal prayed to this court, ten days given to file an appeal bond and sixty days to prepare and file bill of exceptions. On June 16, 1894, the same being the twelfth judicial day of the June term, 1894, of said court, the record says: "Comes the defendant and files its appeal bond in the sum of \$250.00 with W. L. Swormstedt, as surety; which bond is now approved.

"Now comes the defendant and files its bill of exceptions herein which is now made a part of the record, this 23d day of May, 1895."

This last clause appears to have been written in the transcript at another and different time from that when the remainder of the order was copied, and it shows that it was originally written as "May, 1894," and then the 4 changed to a 5, making it read "May, 1895."

Of course, it is plain that the court in the entry of its doings of June 16, 1894, could not note the filing of a bill of exceptions on the "23d day of May, 1895," nearly a year after the order was made.

The bill itself shows that it was tendered to the presiding judge for signature on the sixth day of July, 1894, but not approved

by him, and that it was signed and approved by his successor on the twenty-third day of May, 1895.

The certificate of the clerk attached to the transcript is dated July 23, 1895, which is more than one year ⁵⁶⁵ after the rendition of the judgment appealed from. And in his certificate the clerk does not certify that the bill was ever filed. Neither does the bill itself contain a file mark showing either that it was filed as a bill of exceptions after being signed by the judge or that the longhand manuscript of the evidence was filed before it was inserted in the bill.

The judgment of the court below is affirmed.

INSURANCE—LIFE—ASSIGNMENT.—A policy on the life of the assured, payable to his legal representatives, may be assigned by him with the assent of the insurers, and the rights of the assignees are paramount to the claims of the heirs or personal representatives of the assured: *Robinson v. Hurst*, 78 Md. 59; 44 Am. St. Rep. 266, and note. See, also, the extended notes to *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 143, and *Bicker v. Charter Oak etc. Ins. Co.*, 28 Am. Rep. 292.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

CENTRAL KENTUCKY LUNATIC ASYLUM v. CRAVEN.

[98 KENTUCKY, 105.]

HOMESTEAD—ABANDONMENT.—If a man's wife is adjudged a lunatic while the family is occupying and claiming property as a homestead, the fact that the husband, after the confinement of his wife in the asylum, slept at his father's house part of the time, and took his meals there all the time, is not an act of abandonment of the homestead.

HOMESTEAD—EXEMPTION OF, AGAINST STATE, FROM EXECUTION.—A homestead is not liable to execution on a judgment for the expenses of keeping the debtor's wife in one of the lunatic asylums of the commonwealth.

S. W. Tolin, for the appellant.

J. M. Lassing and O'Hara & Rouse, for the appellee.

105 PAYNTER, J. James T. Craven owned and with his wife occupied a house and two acres of land as a homestead. They had no children. In 1885 the wife was adjudged a lunatic and confined in the Central Kentucky Lunatic Asylum, since which time she has remained there. The husband failing to pay the expenses of his wife at the asylum, this action was instituted by appellant to subject the property to the payment of the claim arising from the confinement of the wife in that institution.

The property is less than one thousand dollars in value. Appellee claimed it was exempt as a homestead, and the court below sustained his claim and adjudged it to him. To review that judgment of the court this appeal is prosecuted.

It is insisted that the appellee's petition is defective because it is not sufficiently alleged that, at the time of the levy of the execution on the property, he was "occupying" it as a home-

stead. Without stopping to inquire as to the correctness of this position, it is sufficient to say that the appellant's answer cured the supposed defect because it denies the occupancy of appellee.

It is claimed by appellant that the appellee is not entitled to the property as a homestead for two reasons: One because he had abandoned the premises after the confinement of his wife in the asylum, and the other because in no event is it exempt from the claim of the commonwealth. Since the confinement of his wife in the asylum appellee has kept his household goods in his dwelling, and his other personal property on the place. He has slept part of the time at his house and part of the time at his father's, who ¹⁰⁷ lives a short distance from him. He has taken his meals at his father's since his wife's confinement in the asylum. These are the facts upon which it is claimed he has abandoned his homestead, and is no longer a housekeeper with a family.

There is no question that he was a bona fide housekeeper with a family, occupying and claiming the property as a homestead when his wife was adjudged a lunatic. The facts show that there has been no intention on the part of the claimant to abandon the homestead. There has been no abandonment of it, unless the forced absence of his wife amounts to an abandonment.

The fact that he sometimes slept at his father's house, and took his meals there all the time, would be no act of abandonment. A party would not lose his homestead because he and his family occasionally slept elsewhere and continuously boarded elsewhere. To do this would not deprive them of the character of housekeepers in fact or in contemplation of the homestead law.

When the homestead right has once attached, the claimant can move away from it and still hold it as a homestead if he has a purpose to again live on it and make it his home. Such temporary absence does not deprive him of his homestead. His wife was as much a part of his family as if she had been living with him. The husband continued under the same legal and moral obligation to support her as existed before she was adjudged a lunatic. The absence of the wife was not even voluntary. It was enforced by disease, to treat which it was necessary to confine her in the asylum. She may at any time have her reason restored and claim her husband's protection and support. For the purpose of determining the husband's right to his homestead ¹⁰⁸ she must be regarded as constituting part of his family and living with him.

This court held, in *Commonwealth v. Cook*, 8 Bush, 220, 8 Am. Rep. 456, that the general rule in regard to the construction of statutes is, that the state is not to be regarded as embraced within the provisions of a statute, unless it is so expressed or by necessary implication was intended to be included. That was a case of the default of a sheriff in the collection and payment of public revenues.

This court held, in the case of *Commonwealth v. Lay*, 12 Bush, 268, 23 Am. Rep. 718, that a homestead was exempt from the payment of fines and costs recovered in the name of the commonwealth. In that case the court said: "These are ordinary executions, issued doubtless for fines imposed or the costs of the proceeding to be paid to officers of the court; and it is obvious that it never was intended by the law-making power that such liabilities on the part of the debtor should operate to deprive his family of the beneficent provisions of the statute."

The debt for the payment of which it is sought to deprive appellee of his homestead is an ordinary debt incurred for board and medical attention to the wife, and the attempt to enforce it is by the method employed by ordinary creditors. We cannot believe that the legislature, in providing asylums for the unfortunate, intended to wrest from the one who was under obligation to pay the expenses of some inmate, his homestead, when the homestead law is the result of a wise public policy.

If the position of the appellant is correct, the fact that appellee had many helpless children depending on him for support would add nothing to the merits of his claim, from a legal standpoint, to his homestead.

From public policy it is held that the commonwealth is not to be regarded as embraced within such provisions of the statute unless so expressed, or by necessary implication was intended to be included. On the other hand, the homestead law is founded on a sound public policy. In this apparent conflict of public policy we must conclude that the legislature never intended that the commonwealth should subject its debtor's homestead to the payment of the expenses of keeping his wife in one of her asylums.

The judgment is affirmed.

HOMESTEAD — ABANDONMENT — EXEMPTION. — Removing from a homestead and residing elsewhere temporarily for the purpose of business, health, or pleasure, does not, unless coupled with an intention not to return, work an abandonment of the homestead: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607. A homestead exemption is not lost by temporary removal from the home-

stead: *McDermott v. Kernan*, 72 Wis. 268; 7 Am. St. Rep. 864. Homesteads are not subject to forced sale, either on execution or on any other final process of the court: *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516; and the state must submit to the same exemptions of a defendant's property that it imposes upon its citizens: See monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 883, 889, showing claims for which homestead is liable.

KENTUCKY WAGON MFG. CO. v. OHIO & MISSISSIPPI RAILWAY COMPANY.

[98 KENTUCKY, 152.]

RAILROADS—CAR SERVICE ASSOCIATION—CHARGE FOR DETENTION OF CARS.—If a common carrier's cars are detained by the consignor or consignee beyond a reasonable time within which to load and unload them, there may be a reasonable charge for such detention, which may be imposed by, and enforced through, what are known as car service associations.

RAILROADS—CAR SERVICE ASSOCIATION—REASONABLENESS OF RULES—QUESTION OF FACT.—Whether a charge of one dollar per day, or fraction thereof, made for detention of cars, and use of track, on cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and whether the time fixed for the loading and unloading, as required by car service rules, is a reasonable time, are questions of fact.

RAILROADS—CAR SERVICE RULES—HOW AFFECTED BY WEATHER.—It is no objection to a rule of a car service association imposing a charge upon the consignor or consignee for detaining a car beyond a reasonable time, that no exception is made in behalf of the shipper by reason of an unfavorable condition of the weather. The rule as to loading and unloading must allow time enough to meet all cases likely to arise, and, when it does so, a rare and exceptional circumstance incident to a particular shipper, at a particular time, cannot annul the rule.

RAILROADS—CAR SERVICE ASSOCIATION—CONSULTING SHIPPER.—If the rules of a car service association are reasonable, the fact that the shipper was not consulted in framing them does not vitiate them, nor can he complain of the fact that no reciprocity of indemnity or counter penalties are provided, as the carrier may be held accountable for any dereliction of duty.

RAILROADS—CAR SERVICE ASSOCIATION—SEPARATE AND JOINT ENFORCEMENT OF RULES.—Railroad companies do not surrender their corporate autonomy and functions by relegating the control and management of their affairs to the control of a car service association; and, if the car service rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly.

RAILROADS—CAR SERVICE RULE NOT IN VIOLATION OF LAW.—A rule of a car service association, fixing a uniform charge for the detention of cars by the consignor or consignee beyond a reasonable time in which to load or unload them, does not violate the law preventing agreements among rival carriers not to compete with one another.

RAILROADS—CAR SERVICE ASSOCIATION—STORAGE CHARGES.—The fact that the delivering road, under car service rules, is authorized to collect storage charges on cars that do not belong to it but to other companies, and which are received from connecting lines, affords a shipper no just ground of complaint, as, under the universal practice among shippers, loaded cars are received from connecting lines, and are used and controlled by the receiving company as its own property.

RAILROADS—CAR SERVICE ASSOCIATION—RETENTION OF SHIPMENT UNTIL STORAGE CHARGES ARE PAID.—If, upon any particular shipment, storage charges have accumulated before it is unloaded by the consignee, and it is still in the car of the carrier, it may be retained until the regulations of the car service association are complied with and the charges paid.

RAILROADS—DELIVERY NOT EXCUSED BY REFUSAL TO PAY CAR SERVICE FEES.—Common carriers, members of a car service association, have no right to decline to switch cars for, or to refuse to deliver freight consigned to, those who refuse to pay for car service, although they have combined to resist the enforcement of the reasonable rules of the association; but the carriers' duty to deliver cannot be enforced by those who wrongfully refuse to pay for car service.

RAILROADS—NONDELIVERY FOR FAILURE TO PAY CAR SERVICE FEES—WRONGDOERS.—Although common carriers, members of a car service association, have no right to decline to switch cars for, or to refuse to deliver freight consigned to, those who refuse to pay car service fees, the shippers thus in default cannot invoke the aid of equity to restrain the carriers from refusing to deliver on their sidetracks, and to compel them to do that which they admit it is their duty to do, and which they are willing to do, upon a compliance by the shippers with the reasonable rules of the association. The shippers, having done the first wrong, and thus caused the wrongdoing of the carriers, are not in an attitude to ask a court of equity to right the wrong by compelling an unconditional delivery of cars to them, and the court may refuse to hear them.

W. O. Harris and Humphrey & Davie, for the appellant.

E. F. Trabue, for the appellee, the Ohio & Mississippi Railway Company.

Lyttleton Cooke, for the appellee, the Louisville & Nashville Railroad Company.

Bullitt & Shield, Gibson, Marshall & Lochre, and Helm & Bruce, of counsel for appellees.

¹⁵⁵ **HAZELRIGG, J.** The Kentucky Wagon Company is a corporation extensively engaged at South Louisville in the business of manufacturing and selling wagons. Its works are located near the junction of the tracks of the Louisville & Nashville and the Louisville Southern railroad companies, and upon its yards it has its own switches and sidetracks, connecting with each of these roads and with these roads alone. It receives its materials in carload lots, and sends out much of the finished ¹⁵⁶ product

in the same way. These railroad companies, the one or the other, have physical connection with every other railroad entering the city of Louisville, and are under contract with the wagon company, for a stipulated consideration, to deliver upon the sidetracks of the latter all loaded cars consigned to that company over their own lines, or over their connecting lines, which cars, when unloaded by the wagon company, the carriers are to remove free of charge.

In February, 1890, the two roads named, together with the other railways entering the city of Louisville, conceiving that their patrons who handled their shipments in carload lots were unreasonably detaining the cars of the carriers, using them for storage purposes and otherwise materially impeding the service, formed what is known in the record as the Louisville Car Service Association, and through it at once promulgated certain rules and regulations calculated to remedy the evil and insure the prompt unloading of the consignments and consequent prompt return of the cars.

On the other hand, the shippers, conceding that the abuse complained of had in fact grown up, though not through their fault, and contending that the association of the carriers was illegal and wrongful, and the rules they were attempting to enforce unreasonable and exorbitant, formed a counter-association to resist their enforcement. The wagon company was a member of this organization, and refusing to conform to the rules of the car service association or pay the charges accumulating against it by reason of its detention of cars for more than forty-eight hours after delivery the carriers refused to deliver freight consigned to it over their respective lines.

Thereupon, in November, 1890, the wagon company brought this action in equity against some eleven of the ¹⁵⁷ railroad companies to restrain them from refusing to deliver to it on its sidetracks, because of its noncompliance with the car service rules, certain designated carloads of freight ready for delivery, and from so refusing in the future.

The original order which issued on the plaintiff's petition enjoined the defendants from further refusing to deliver to the plaintiff the carloads of freight held by them respectively, but thereafter, in August, 1891, and after much of the proof had been taken, the court so modified the order as to require the wagon company to return and redeliver to the railway companies the cars delivered by them within the time prescribed by the car service rules; and such seems to have been the atti-

tude of the parties upon the rendition of the final judgment herein in December, 1891, when the chancellor refused to grant the relief asked by the plaintiff, dissolved the injunction, and dismissed the petition without costs.

The question to be determined at the threshold of our investigation of this case is, whether or not the rules and regulations of the associated defendants are reasonable and just, and such as the plaintiff ought to have regulated its business by. Whether, if reasonable, the carriers might enforce them by a combination or association, and whether, however reasonable the rules may be, and however wrongful may have been the action of the defendants in resisting them, the carriers could lawfully refuse to deliver the freight consigned to the owners, are questions to be considered further along, as is the question whether, conceding the refusal of the carriers to deliver the freight to have been wrongful, the plaintiff is in an attitude to ask the chancellor to right the wrong by compelling an unconditional delivery of the cars to it.

¹⁵⁸ The rules of the association are of great length, and need not be recited in detail. A discussion of the grounds upon which the appellant seeks to impeach them will sufficiently indicate their nature and purpose. Those grounds, as carefully grouped by the learned chancellor, are as follows: "1. That the period of forty-eight hours, which, computed under car service rules, extends to near sixty hours, within which it is required to unload said cars after delivery, is too short; 2. That the demurrage charge of a dollar per day per car for the detention of cars after the expiration of said forty-eight hours is exorbitant and excessive; 3. That neither the plaintiff nor any other shipper or consignee was consulted by the defendants in the framing of said rules, and that neither it nor any other shipper or consignee has any voice in the selection and appointment of the manager or committee of the car service association; 4. That there is no reciprocity of indemnity and counter-penalty in said rules in favor of plaintiff and other shippers and consignees against the defendants for not promptly performing their duties as common carriers; 5. That the defendants, by entering into the car service association, have surrendered their corporate autonomy and functions, and relegated the control and management of their business as common carriers to the arbitrary control of the manager and committee of the car service association, and have thereby agreed to abolish competition, and that for this reason

the said rules are illegal; 6. That under the car service rules a delivering railroad company is authorized to demand demurrage charges on cars that do not belong to it but to other companies."

That there may be a reasonable charge for the detention of the carrier's cars by the consignee or consignor beyond a ¹⁵⁰ reasonable time within which to load and unload them cannot now be doubted, and that such charges may be imposed and enforced through what are known over the country as car service associations is equally well settled.

A few cases only had arisen in the courts prior to the institution of this action, but several have since been considered, and we know of no exception to the general doctrine that reasonable rules, involving charges for such detention, may be promulgated by such associations, and that such organizations have universally been held to effect beneficial results in car service, alike to the shipper and to the carrier.

Whether a charge of one dollar per day or fraction thereof made for detention of cars and use of track on cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading, as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. Such was the finding of the chancellor at the hearing of the motion for a modification of the injunction and his conclusion at the final hearing, and such was the opinion of the judge of this court as to the reasonableness of the time for redelivery when the case was heard on a motion to reinstate the injunction after its modification.

Such, indeed, has been the determination of every tribunal where a similar provision has been adopted by the various car service associations of the country, nor has it been found objectionable to the courts because no exception is made in behalf of the shippers by reason of an unfavorable condition of the weather.

¹⁶⁰ The rule, to be beneficial to all alike, must be of universal application, and a rare or exceptional circumstance, incident to a particular shipper at some particular time, cannot be allowed to annul the rule. The rule must allow time enough to meet all cases likely to arise, and that such is the case here is abundantly shown by the testimony.

That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent on the first cost of a car, but this is not the proper criterion. A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks and other expenditures.

It may be true, as contended, that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them. No complaint is made that there was an attempt to enforce them before ample notice had been given of their adoption. So, too, if the rules are reasonable, the fact there is no reciprocity of indemnity or counter-penalties provided cannot avail the appellant.

If there is any principle of the law well understood by shippers it is that, for any dereliction of duty, the common carrier may be held accountable; nor do we think that the roads surrendered their corporate autonomy and functions by relegating the control and management of their affairs to the control of the association. If the rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. In the executive committee of this voluntary association each road has its representative, and the rules adopted by the association are accepted by the carriers and become their own rules. What ¹⁶¹ the carriers may each do for themselves they do by a common agent. This practice is common where union depots are under the control of a common agent of all the roads using the depot.

It is true that the rule involves the agreement of the roads to make their charges uniform, and this is supposed by counsel to be in violation of the law preventing agreements among rival carriers not to compete with each other.

We do not regard the principle contended for as applicable to this case. Manifestly, the object of the rule fixing a uniform charge for the detention of cars is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation, and the less revenue there is derived from the enforcement of the charge the greater the carriers are benefited and their facilities increased for serving the public. The agreement in this case to fix a uniform rate is an advantage and not an injury to the appellant and its associates.

It is said, further, that under the car service rules the delivering road is authorized to collect storage charges on cars that do

not belong to it but to other companies. This, if true, would not seem to be material to the appellant, but it is only true in a qualified sense. The universal practice among carriers is, that instead of the railroad company which first handles the shipment, unloading it at its terminal point, thus necessitating a transfer to a connecting line to be forwarded to its destination, the cars containing the freight are delivered to the connecting line, and the line takes charge of and uses and controls the car so received as its own property. It keeps it in repair while so using it as it does its own cars, and, under a mutual and universal custom, is entitled to all its earnings. Certainly, no custom ¹⁶² or regulation is more beneficial to shippers than this, for otherwise a transfer must be made at each terminal point of the carrier.

The assumption is, that this interchange of cars will work out equal advantages to all, but to still further equalize the earnings an account of the mileage is taken, and the road using the car renders an account to the road in fact owning it on the basis of three-quarters of a cent a mile so run.

We are convinced, therefore, that no valid objection can be urged against the enforcement of these rules of the appellees as announced through this association. They not only commend themselves to the reason and common experience of those observant of such matters, but, as we have indicated, they have found approval at the hands of a number of the courts of the country, and we may add of a number of state boards of railroad commissioners, whose business has been to carefully investigate such questions in behalf of the general business public: *Miller v. Georgia R. R. Co.*, 88 Ga. 563; 30 Am. St. Rep. 170; *Miller v. Mansfield*, 112 Mass. 260; *Chicago etc. Ry. Co. v. Pioneer Land Co.* (Iowa, 1892); *Beach's Railway Law*, sec. 924; *Union Pacific etc. Ry. Co. v. Cooke* (Colo. 1892); cited in 50 Am. & Eng. R. R. Cas. 89, note.

Admitting all this, the question remains: Is the refusal of the appellant and its associates, even acting as they did under a combination to resist the enforcement of these reasonable rules, a legal excuse for the carrier's refusal to deliver freight-cars on the appellant's sidetracks and switches?

If, upon any particular shipment, storage charges accumulated before it was unloaded by the consignee, and it was still in the car of the carrier, we see no reason why it might ¹⁶³ not be retained until the regulation be complied with and the charges paid. The carrier undoubtedly has a lien on the freight while

in his control, and cannot be compelled to surrender his security; but if he delivers the freight without collecting the car service fee, can it be said that he may refuse to do his duty as a common carrier and decline to deliver freight subsequently consigned? If a passenger owe a former bill to the railway, can he be turned away when he tenders his ticket for the trip he is then about to take?

The car service fees in this case were due only to two of the carriers, and, if the excuse offered were valid, the other appellees were without even that. The appellant owed them nothing; but the plea is wholly insufficient as an excuse for any of the carriers. They occupy the same attitude, and it is wholly immaterial whether they had or had not demands arising out of the failure of the appellant to pay the arrearages for the car service. It was the duty of the roads not in connection with the appellant's yards to deliver the freight consigned to it to the roads which were in such connection, and the duty of those roads to receive it and deliver it to the appellant.

The right of the carriers to thus decline to switch cars for those who refuse to pay the bill for car service, as defined in the rules of the association, is made the basis of earnest argument by counsel for appellant that such an unreasonable regulation itself affords ample excuse for the appellant's combination to resist the enforcement of the rules. But it is observable that the enforcement of this rule is made to depend on the refusal of the consignee to comply with the regulations.

The conditions upon which it may be put in force cannot exist except at the will of the shipper. He must first wrongfully ¹⁶⁴ refuse to comply with the rules before any excuse is given the carrier to do the second wrong, and we think the appellant cannot complain of the wrongdoing of the carrier, made possible by his own wrongful refusal to comply with other reasonable regulations of the carrier. And this brings us to a consideration of the question: Is the appellant in an attitude to ask the aid of a chancellor to compel the carrier to do that which it admits is its duty to do, and which it is willing to do, upon a compliance on appellant's part with the reasonable rules of the association?

Of the two wrongdoers, we have seen that the appellant was the first; and upon ample authority the chancellor may refuse to hear him. Especially so when the delivery of the specific cars withheld by the carriers was accomplished upon the issual of the mandatory injunction when the petition was filed. The carriers

obeyed the order to deliver, so that no injury in that particular case accrued to the appellant by withholding the relief sought.

In *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, the complainants, who were tobacco buyers, withdrew from the board of trade because the warehousemen, also members of the board, were charging them too much. They resolved in a body not to buy from the warehousemen until the latter should accede to their demands. In doing this they acted in violation of the rules of the board. The warehousemen subsequently and illegally refused them admittance to their rooms, and the chancellor was asked to compel such admission. This court said: "We have already adjudged that all have the right, upon payment of reasonable fees and charges, to enter these public warehouses, nor do we determine that such a right does not belong to the appellants; but, while this right exists, it does not follow that the chancellor will undertake to ¹⁰⁵ grant relief by injunction when the one party is as much in fault as the other." And the judgment below dismissing the petition was affirmed.

This cannot result, as feared by counsel, in putting the proper control and regulation of the business relations of these carriers with their patrons beyond the power of the courts, or relegate the grievances of shippers to the mercy of the carrier. Doubtless the appellant has paid to these carriers bills of freight to the extent of thousands of dollars and not a few of them inaccurate. If these inaccuracies and errors were not corrected and the carrier made to adjust them, it was certainly not because the courts were not open to its complaints.

If the rules of the association provide, as they seem to do, an easy remedy for the settlement of conflicting claims among the parties interested, it is to be regarded only as an additional mode of adjusting these inevitable differences to the slower processes of the law. As suggested in *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, it may be expected that the personal and mutual interests of the parties in securing a prompt and satisfactory car service, so important to all, will certainly lead them to a fair adjustment of their differences without the aid of the chancellor.

Judgment affirmed.

RAILROADS—DEMURRAGE FOR DETENTION OF CARS.—A charge by a railroad company against a consignee of one dollar per car per day for every day that cars remain unloaded after notice to the consignee of their arrival, and the lapse of three days, is reasonable and valid: *Norfolk etc. R. R. Co. v. Adams*, 90 Va. 393; 44 Am. St. Rep. 916, and monographic note thereto on railroad demurrage.

showing the right to make and collect charges for detention of cars by consignees, and that a car service rule promulgated by a person or board of persons representing a combination of carriers does not impair its effect as a regulation of a particular company.

McCALL v. HAMPTON.

[98 KENTUCKY, 166.]

EXPECTANCIES—SALE OR ASSIGNMENT OF, BY HEIR.
A naked possibility or contingency, not founded upon a right or coupled with an interest, cannot be assigned or sold. Hence, the naked possibility or expectancy of an heir to inherit his ancestor's estate is not the subject of sale or assignment, and such a contract, if made, is not enforceable, either at law or in equity, upon the ancestor's death.

Thomas R. Brown, for the appellant.

John F. Hager, for the appellee.

¹⁶⁷ **PAYNTER, J.** The appellant, holding by assignment a certain note against Wade Hampton, instituted this action, in which an attachment was obtained and levied on what was claimed to be his interest as an heir at law in certain lands in Boyd county which belonged to his father, William Hampton, who died intestate on the 26th of August, 1889.

Charles H. Hampton, a brother of Wade Hampton, died on the 7th of February, 1889. His personal representative presented his petition in the action and was made a defendant therein. The allegations which it contains are substantially as follows, to wit: That Wade Hampton was suffering from a cancer, and was without means to procure medical treatment for his malady; that his father had expressed a desire to sell part of his land to aid him; that the father was then too infirm to make such disposition of his property; that in order that he might procure medical treatment, in ¹⁶⁸ consideration of eight hundred dollars, Wade Hampton sold and by deed conveyed to Charles H. Hampton, all right, title, and interest he then had, or might thereafter become entitled to, from the estate of his father, William Hampton, of whatsoever character; that by the deed he attempted to convey to him his whole interest as fully as if he were then seised and possessed of the same, and that the deed contained a covenant of general warranty.

This deed was executed on the 27th of January, 1886, more than three years before the death of the father. To this pleading a demurrer was filed and overruled, and, appellant failing

to plead further, the petition was dismissed and the attachment discharged.

The question raised by the demurrer, and which is to be determined, is, Did Charles H. Hampton acquire the interest of Wade Hampton in his father's estate by virtue of the conveyance which he received for it?

That a contingent interest is the subject of transfer and sale there can be no doubt. A contingent estate, which is to vest upon some future event, such as the owner becoming of age, may become the subject of assignment or contract of sale: *Grayson v. Tyler*, 80 Ky. 363.

The question in this case is, whether a naked possibility or contingency, not founded upon a right or coupled with an interest, can be assigned or sold. Under the common law, this could not be done. There is no statute in this state changing the common law on this subject. When the contract was made and the conveyance made to Charles H. Hampton, Wade Hampton did not have any interest in his father's estate. The subject matter of the contract was not in esse at the time of the contract. A contract of bargain and sale is invalid unless there is a thing or subject matter to be contracted ¹⁰⁰ for. This is absolutely essential to the validity of the contract.

It has been said that "if a son and heir bargains and sells the inheritance of his father this is void because he hath no right in himself": *Coke on Littleton*; 2 *Bacon's Abridgment*, tit. Bargain and Sale, 4.

This question was fully considered in the case of *Wheeler v. Wheeler*, 2 Met. (Ky.) 474; 74 Am. Dec. 421. The court held that the son, who had executed a deed purporting to convey his interest in his father's estate (the father then being alive) to his brother, was, notwithstanding that fact, entitled to recover the interest in the estate which his deed purported to convey.

It is conceded by counsel for appellee that it is essential to the legal validity of a contract that the thing sold must have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of sale or assignment. Notwithstanding this is the common-law rule, it is insisted that the naked possibility or expectancy of an heir to his ancestor's estate may be the subject of a contract of sale for a valuable consideration, and enforced in equity after the death of the ancestor.

There was no claim in *Wheeler v. Wheeler*, 2 Met. (Ky.) 474,

74 Am. Dec. 421, that the sale was not in good faith nor for a valuable consideration, still the court held he was entitled to recover.

In the case of *Alves v. Schlesinger*, 81 Ky. 290, the facts were substantially as they are in the case at bar. The conveyance was for a valuable consideration. After the death of the ancestor, a creditor of the heir, who undertook to sell his interest in his ancestor's estate during the ancestor's lifetime, sought to subject such interest to the payment of his ¹⁷⁰ debt. The party to whom the contract of sale had been given claimed the interest under the contract, and denied the creditor's right to subject it to the payment of the debt. The court sustained the claim of the creditor.

To recognize the contention of counsel as being correct requires us to overrule *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421, and *Alves v. Schlesinger*, 81 Ky. 290. Let us consider if this should be done.

Every text-writer and every court in this country, so far as we are aware, recognize the rule of the common law to be as we have stated it. Some text-writers say, and some courts have held, that a mere possibility or expectancy is assignable in equity for a valuable consideration, and equity will enforce the contract when the possibility or expectancy has changed into a vested interest or possession.

The explanation is sometimes that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract by decreeing a conveyance.

East Lewisburg etc. Co. v. Marsh, 91 Pa. St. 96, is cited by counsel for appellee and the court assigned this as the reason for its decision, viz: "Equity will support assignments of contingent interests and expectancies, things which have no present actual existence, but rest in mere possibility, not indeed as a present positive transfer operating in praesenti, for that can only be a thing in esse, but as a present contract to take effect and attach as soon as the thing comes in esse."

This case is cited to sustain the text (*Pomeroy's Equity Jurisprudence*), wherein it is stated that equity will enforce contracts of sale of bare possibilities and expectancies. In the note to the text it is said: "In my opinion this theory of agreement is hardly adequate to explain the full doctrine."

¹⁷¹ The learned author (*Pomeroy's Equity Jurisprudence*, sec.

1287, note 1) feeling that the courts which held that such contracts could be enforced in equity after the death of the ancestor were failing to give an adequate reason for these decisions on the "theory of agreement," and that it would not do to admit that the right to the expectancy did not attach until the death of the ancestor, presented as the rationale of the equitable doctrine (section 1271) that the assignee of the expectancy acquired at once a present equitable right over the future proceeds of the expectancy, which was of such certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the expectancy into an interest in possession; that there was an equitable ownership or property in abeyance to be changed to an absolute property upon the happening of the future event.

The learned author was conscious of the fact that when a court said that the assignee or vendee did not take a present interest in the thing contracted for it was illogical that such interest would attach as soon as the thing came in esse. His conclusions were correct. But when he endeavors to give the correct theory upon which courts of equity proceeded, he gives one more indefensible than the one which he criticises. He states a matter which does not exist in fact or law; that a bare possibility or expectancy is "sure to ripen into an ordinary equitable property right." On the contrary, it is absolutely uncertain that it will ripen into a property right at all. Notwithstanding the thing is not in esse, the learned author says that there is acquired at once a present equitable right over the future proceeds of the expectancy.

¹⁷² Here we have the assignee or vendee taking a present right in a thing not in existence and in the proceeds of an expectancy which may never materialize. To reach his conclusion he utterly disregards the legal significance of the words "naked possibility or expectancy." They import a hope of succession but not a certainty, as implied by the statement that they were sure to ripen into a property right. His premises are false and conclusions erroneous.

It is axiomatic that in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject matter—nothing in esse about which a contract can be made—the essential thing to the validity of a contract is absent, hence such contract is declared by the law to be void. If it be

void, then no party to it can maintain an action upon it. A wise public policy produced the law which fixed the status of parties to such a contract. If it is wholesome to declare such contract invalid, why should courts of equity enforce such contract in defiance of the law and a wise public policy? If this is to be the practice of courts of equity, then the common law on this subject is a dead letter and inoperative. Why should the common law declare such contracts invalid and void if courts of equity have the power to vivify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void, and yet say that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity any more than at law, and we agree with such courts upon the question.

It seems at this late day it is needless to discuss the wisdom¹⁷³ and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, save free and untrammelled the actions of the possessors of estates in their distribution. If there were no other reasons for adhering to the rule, those just suggested would be all sufficient, in our opinion, for doing so.

Judgment reversed, with directions to set aside the order overruling the demurrer and for further proceedings consistent with this opinion.

Assignment of Expectancies.*

Definitions.—"An expectancy, or chance, is a mere hope, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility, and, at other times, less than a possibility. It is a possibility in the popular sense of the term. But it is less than a possibility in the specific sense of the term 'possibility.' For, it is no right at all, in contemplation of law, even by possibility; because, in the case of a mere expectancy, nothing has been done to create an obligation in any event; and where there is no obligation, there can be no right; for right and obligation are correlative terms": 2 Fearne on Remainders, 28; Jeffers v. Lampson, 10 Ohio St. 102, 107.

*** REFERENCE TO MONOGRAPHIC NOTES.**

Grant by heir apparent of his interest in his ancestor's estate: 87 Am. Dec. 128-130.

Assignment of demand to become due, validity of: 87 Am. Dec. 440-442.

Assignment of mere possibilities or contingencies: 94 Am. Dec. 649-651.

Contingent remainders, how barred, defeated, or conveyed: 17 Am. St. Rep. 830-842.

"The word 'possibility' has a general sense, in which it includes even executory interests which are the objects of limitation. But, in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin, like a right of entry. And what is termed a bare or mere possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir, apparent or presumptive, has of succeeding to the ancestor's estate": *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; citing *Smith on Real and Personal Property*, 192.

There are, then, two kinds of possibilities: the one, a bare possibility; that which the heir has from the curtesy of his ancestor, and which is nothing more than a mere hope of succession; the other, a possibility, or contingency, coupled with an interest: *Jones v. Roe*, 3 Term Rep. 88, 93, per Lord Kenyon, C. J. A possibility coupled with an interest includes all contingent and executory interests in land, as springing and shifting uses, contingent remainders, and executory devises: *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121, 135. The phrase "expectant heir" is used in England, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, so that the doctrine includes not only those who, in a popular sense, may be called expectant heirs, but also remaindermen and reversioners: *Baynon v. Cook*, L. R. 10 Ch. App. 389, 391, note; *Earl of Aylesford v. Morris*, L. R. 5 Ch. App. 484.

A bare possibility, not coupled with an interest, such as the hope of an heir of succeeding to his ancestor's estate, is not at law an object of disposition *Jones v. Roe*, 3 Term Rep. 88, 93; *Skipper v. Stokes*, 42 Ala. 235; 94 Am. Dec. 646; *Purcell v. Mather*, 35 Ala. 570; 76 Am. Dec. 307; *Patterson v. Caldwell*, 124 Pa. St. 455; 10 Am. St. Rep. 589; but a possibility coupled with an interest is devisable: *Jones v. Roe*, 3 Term Rep. 88, 93; *D'Wolf v. Gardiner*, 9 R. I. 145; *Ridgeway v. Underwood*, 67 Ill. 419.

Thus, where a son takes a vested remainder under his father's will, this interest is not a mere hope, such as an heir apparent has of succeeding to the ancestor's estate, but one which has its foundation, in the language of *Fearne on Remainders*, above cited, in a "provision," the "legal act," of his father's will; and the son's conveyance of his expected estate will bind him: *Jeffers v. Lampson*, 10 Ohio St. 102. So, if a husband devises to his wife the use for life of his real estate, and after her death the property to his heirs, or

sons, or daughters, or to any other persons, such remaindermen have an estate in expectancy, and such estate is descendible, devisable, and alienable: *Moore v. Littel*, 40 Barb. 488. A reversioner has neither actual nor constructive possession of the land, nor the right to either, but has simply an estate in expectancy, the life estate intervening: *Metcalf v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617. One who has a present right, though not to take effect in possession until the happening of a future event, may release such right to the one in possession. Thus, if a testator devises to his son David one hundred and twenty-five acres of land, undivided, and then, after devising real estate to his other sons, provides that, if one or more of them shall die, without lawful heirs, then his or their portion shall go to, and become vested in, the survivor or survivors of said sons, his or their heirs or assigns, as tenants in common, the brothers of David, during his lifetime, have such an interest in the land devised to him, as may be released to David; and the title in fee, becomes vested in David where the other brothers all unite in a quitclaim deed to him after the ancestor's death: *Lintner v. Snyder*, 15 Barb. 621. A person, sui juris, owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the former does not stand toward him in a trust relation, and, in making the purchase, acts in good faith: *Whelen v. Phillips*, 151 Pa. St. 312, 322. In this case, a legatee was entitled, under a will, to a legacy of four thousand four hundred and sixty-six dollars and sixty-six cents, contingent upon his surviving his mother. He got into financial straits during her lifetime, and sold his interest in the legacy for one thousand dollars to a person who stood in no trust relation to him. There being no evidence of oppression or bad faith in the transaction, it was held that the sale passed a good title to the purchaser: *Whelen v. Phillips*, 151 Pa. St. 312.

It is also to be observed that the hope of obtaining or acquiring property is not confined to heirs, as property may be acquired from an expected gift, or by future earnings, etc.; but cases of this class are excluded from this note, which deals simply with expectancies as specifically applied to an heir's mere hope of succession, unfounded in any limitation, provision, trust, or legal act, whatever, and to a limited extent with possibilities coupled with an interest. It may also be stated here that the expectation of an estate is a very different thing from the "expectant estate" mentioned in the statute of descents, for it is provided by statute, in some jurisdictions, that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession"; but such a statute does not mean that a naked possibility, not arising from a limitation in a deed or devise, as of a son inheriting the estate of his father living at the time of the grant is alienable: See *Matter of Mericlo*, 63 How. Pr. 62, 67; *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121, 139. By the term "expectant estates," used in the Revised Statutes of the state of New York, "the legislature," says the chancellor in *Lawrence v. Bayard*, 7 Paige, 70, 76, "intended to include every present right or interest, either vested or contingent, which may, by possi-

bility, vest in possession at a future day. The mooted question whether a mere possibility coupled with an interest is capable of being conveyed or assigned at law, is, therefore, forever put at rest in this state." It follows that in New York a mere possibility, coupled with an interest is capable of being conveyed or assigned at law, as well as in equity, in the same manner as an estate or interest in possession: *Lawrence v. Bayard*, 7 Paige, 70; *Munsell v. Lewis*, 2 Denio, 224; reversing same case, 4 Hill, 635. But this doctrine has no application to a mere naked possibility, not coupled with an interest: *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121, 133. Consequently the term "expectant estates" does not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent: *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121, 133.

Invalid at Law.—It is essential to the validity of every executed contract of bargain and sale that there should be a thing or subject matter to be contracted for, and, if it appears that the subject matter of the contract was not, and could not have been, in esse at the time of such contract, the contract itself is of no effect, and may be disregarded by either party. The thing sold must have an actual or potential existence. Hence, a mere possibility or contingency, not founded upon a right, or coupled with an interest, cannot be a subject of assignment or sale. The right which an heir, apparent or presumptive, possesses in the estate of his ancestor, during the lifetime of the latter, is a bare possibility, coupled with no interest, and is, therefore, not a subject of disposition, at law, though the rule, in equity, as we shall show further on, is different. In such a contract there is no subject matter, and this makes it inoperative. The general rule, therefore, is, that executory contracts made to control the distribution of a man's estate, after his death, are not binding at law. In other words, a transfer or disposition of a mere possibility, such as an estate in expectancy, not coupled with any interest, and where there is no present existing right, is inoperative at law: *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; *Wheeler v. Wheeler*, 2 Met. (Ky.) 474; 74 Am. Dec. 421; *Stover v. Eycleshimer*, 46 Barb. 84; *Boynton v. Hubbard*, 7 Mass. 112; *Watson v. Dodd*, 68 N. C. 528, 530; *McClure v. Raben*, 133 Ind. 507; 36 Am. St. Rep. 558; *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646; *Bayler v. Commonwealth*, 40 Pa. St. 87; 80 Am. Dec. 551; *Purcell v. Mather*, 35 Ala. 570; 76 Am. Dec. 307; *D'Wolf v. Gardiner*, 9 R. L. 145; *Ridgeway v. Underwood*, 67 Ill. 419; *Mastin v. Marlow*, 65 N. C. 695; *Tooley v. Dibble*, 2 Hill, 641; *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134; *Murphy v. Murphy*, 12 Ohio St. 407, 416; monographic note to *Trull v. Eastman*, 37 Am. Dec. 128, on grant by heir apparent of his interest in his ancestor's estate; *Fortescue v. Satterthwaite*, 1 Ind. 566; *Hart v. Gregg*, 32 Ohio St. 502. There are cases, however, holding that the law will protect an equitable assignment by an heir of his expectancy: *Stevens v. Palmer*, 15 Gray, 505; *Fitch v. Fitch*, 8 Pick. 480; *Jenkins v. Stetson*, 9 Allen, 128; *Lewis v. Madisons*, 1 Munf. 803.

Nothing passes by conveyance of heir apparent: *Davis v. Hayden*, 9 Mass. 514; *Jackson v. Bradford*, 4 Wend. 619; *Stoven v. Eycleshimer*, 46 Barb. 84. Hence, if an heir, prior to his ancestor's death, conveys his interest in the latter's estate, and there is a judgment against the heir, previous to the conveyance, on which, after the descent of the property, a sale is had, the purchaser at such sale, and not the grantee under the conveyance, takes the land: *Jackson v. Bradford*, 4 Wend. 619. And a quitclaim deed purporting to convey one's right of expectancy or possibility of inheritance, does not affect the grantor's title as heir, subsequently acquired: *Tooley v. Dibble*, 2 Hill, 641. Nor will a release, without warranty, express or implied, and which is not founded on a right in being, estop an heir from claiming a right of expectancy or possibility of inheritance, which the deed of release purports to convey: *Dart v. Dart*, 7 Conn. 250.

A person's attempted disposition of his expectant interest in his ancestor's estate, without the ancestor's consent, is regarded by the law with disfavor. It affects not only the ancestor but the public, and is regarded not only as a fraud upon the ancestor: *McClure v. Raben*, 133 Ind. 507; 36 Am. St. Rep. 558; *Boynton v. Hubbard*, 7 Mass. 112; but as against public policy: *McClure v. Raben*, 133 Ind. 507; 36 Am. St. Rep. 558; *Boynton v. Hubbard*, 7 Mass. 112; *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694.

"Where the ancestor," says Coffey, C. J., in *McClure v. Raben*, 133 Ind. 507, 36 Am. St. Rep. 558, "has no knowledge of the contract, he may permit his property to go under the law of descents, believing that his son, or next of kin, will receive the benefit, when, in truth, it goes to an entire stranger, if the contract is to be enforced. This he might not be willing to do if he was informed of the facts. By keeping him ignorant of the facts, he is induced to leave his property to a stranger, without his knowledge or consent. This is a fraud upon him." And, with respect to the manner in which such contracts may affect the public, Parsons, C. J., says, in *Boynton v. Hubbard*, 7 Mass. 112, 121: "Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly, the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens."

Enforceable in Equity.—It has been held, with the principal case, that the expectancy of an heir to inherit his ancestor's estate, is not an interest capable of assignment in equity any more than at law: *Boynton v. Hubbard*, 7 Mass. 112.

But, as equity will support assignments which rest in mere possibility only: *Mitchell v. Winslow*, 2 Story, 630, 639; *Stott v. Franey*,

20 Or. 410; 23 Am. St. Rep. 132; *Pierce v. Robinson*, 13 Cal. 116; *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 78, 86; *Crum v. Sawyer*, 132 Ill. 443; and as an assignment of a contingent interest, or possibility of an inheritance is equally allowable with an assignment of a possibility of a personal thing or chattel real, the general current of authority supports the proposition that, while an assignment, transfer, or other disposition of an expectancy of an inheritance is invalid at law, it may, when not contrary to public policy, be enforced in equity; and agreements for the sale, assignment, or release of such expectancies, if fairly made and for an adequate consideration, are enforced, in equity, upon the death of the ancestor: *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134; *Patterson v. Caldwell*, 124 Pa. St. 455; 10 Am. St. Rep. 598; monographic note to *Trull v. Eastman*, 87 Am. Dec. 128, on grant by heir apparent of his interest in his ancestor's estate, and English cases there cited; *Watson v. Smith*, 110 N. C. 6; 28 Am. St. Rep. 665; *Whelen v. Phillips*, 151 Pa. St. 312; *Steele v. Frierson*, 85 Tenn. 430; *Bailey v. Happin*, 12 R. I. 560, 568; *Wilcox v. Daniels*, 15 R. I. 261, 263; *Bacon v. Bonham*, 33 N. J. Eq. 614; *Collins' Appeal*, 107 Pa. St. 590; 52 Am. Rep. 479; *Bayler v. Commonwealth*, 40 Pa. St. 37; 80 Am. Dec. 551; *Lewis v. Madisons*, 1 Munf. 803; *Ridgeway v. Underwood*, 67 Ill. 419; *Crum v. Sawyer*, 132 Ill. 443; *Clendening v. Wyatt*, 54 Kan. 523; *Wood v. Mather*, 38 Barb. 473, 482; *Varick v. Edwards*, 1 Hoff. Ch. 382; *Parsons v. Ely*, 45 Ill. 232, 241; *Hoyt v. Hoyt*, 61 Vt. 413; *Fitzgerald v. Vestal*, 4 Sneed, 257; *Mastin v. Marlow*, 65 N. C. 695; *Kuhn's Estate*, 163 Pa. St. 438; *Hinkle v. Wanzer*, 17 How. 353, 367; *King v. Berry*, 8 N. J. Eq. 44; *Kennedy v. Parke*, 17 N. J. Eq. 415; *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434; *Stover v. Eycleshimer*, 46 Barb. 84; 4 Abb. App. Dec. 309; *Harwood v. Took*, 2 Sim. 192; *Wethered v. Wethered*, 2 Sim. 183; *Beckley v. Newland*, 2 P. Wms. 182; *Hinde v. Blake*, 8 Beav. 234; *Hobson v. Trevor*, 2 P. Wms. 191; *Lyde v. Mynn*, 1 Mylne & K. 683; 4 Sim. 505; *Smith v. Baker*, 1 Young. & C. Ch. 223; *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435. A contract of an heir to release his expectancy in an estate is not, however, enforceable until the death of the ancestor, and no cause of action accrues thereon until that time: *Clendening v. Wyatt*, 54 Kan. 523.

Courts of equity are in the habit of giving effect to assignments of contingent interests and expectancies, whether they are in real or personal property, "not, indeed, as a present positive transfer, operative in present, for that can only be done of a thing in esse, but as a present contract, to take effect and attach as soon as the thing comes in esse": *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 79, 86; *Union Mfg. Co. v. Lounsbury*, 41 N. Y. 363, 374; *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *Collins' Appeal*, 107 Pa. St. 590; 52 Am. Rep. 479; *Ely v. Cook*, 9 Abb. Pr. 366; 2 Hilt. 418; *Pierce v. Robinson*, 13 Cal. 116; *East Lewisburg etc. Mfg. Co. v. Marsh*, 91 Pa. St. 96; *Ruple v. Bindley*, 91 Pa. St. 296; *Ridgeway v. Underwood*, 67 Ill. 419; *Crum v. Sawyer*, 132 Ill. 443. In other words, a sale, assignment, or release of an expectancy will take effect in equity when the subject to which it refers has "ceased to rest in possibility," and has "ripened into reality": *Pierce v. Robinson*, 13 Cal. 116, 124;

Ridgeway v. Underwood, 67 Ill. 419; or, when the assignor is in a condition to give it effect: Bailey v. Hoppin, 12 R. I. 560, 568. Thus, a street contractor may assign his right to receive warrants for street work, and such assignment creates an equitable interest in such expectancy, which a court of equity will protect by decreeing the delivery of the warrant, when issued: Stott v. Franey, 20 Or. 410; 23 Am. St. Rep. 132. And this principle applies to the sale, assignment, or release of a possibility of inheritance, although a court of equity scrutinizes such contracts with jealousy and caution. If made bona fide, and for a valuable consideration, such an instrument may be regarded, by a court of equity, not as a trust attaching to the estate, but as a contract, which it will protect and enforce, after the ancestor's death, and, after the right of the vendor attaches, against the claims of the grantor's creditors: Stover v. Eycleshimer, 46 Barb. 84; 4 Abb. App. Dec. 309; Fitzgerald v. Vestal, 4 Sneed, 257; Steele v. Frierson, 85 Tenn. 430, 435; Crum v. Sawyer, 132 Ill. 443. "The fact," says Lurton, J., in Steele v. Frierson, 85 Tenn. 430, 435, "that such sales or assignments will be closely scrutinized by courts to prevent frauds upon expectant heirs, or persons in necessitous circumstances, does not at all affect the power of the courts to give effect to such sales when fairly made and for full consideration." And a sale, assignment, or release of an expectancy by an heir is enforced in equity, after the ancestor's death, and after the expectancy has fallen into possession, not as a trust in the estate, but as a right of contract: Ridgeway v. Underwood, 67 Ill. 419, 428; Crum v. Sawyer, 132 Ill. 443; Bacon v. Bonham, 88 N. J. Eq. 614; Brown v. Brown, 66 Conn. 493, 498. An expectation as devisee of one yet living may be settled on marriage: In re Wilson's Estate, 2 Pa. St. 325. An estate in expectancy, though contingent, is a proper subject of contract; and all agreements by expectant heirs in regard to their future contingent estates, when fairly made, upon valuable consideration, will be enforced in equity: Parsons v. Ely, 45 Ill. 232; Kuhn's Estate, 163 Pa. St. 438. An agreement among heirs, entered into prior to their ancestor's death, may be enforced in equity after his death, where it has been so acted upon that to refuse such relief would be inequitable: Hoyt v. Hoyt, 61 Vt. 413, 419. An assignment of a mere expectancy will be given effect in equity, not as a grant, but as a contract, entitling the assignee to a specific performance as soon as the assignor has the power to perform it: McDonald v. McDonald, 5 Jones Eq. 211; 75 Am. Dec. 434. The contract of an heir expectant to convey what may descend to him by the death of the ancestor, is obligatory upon him, if there is no proof of positive fraud or imposition, and equity will enforce it. If no undue advantage has been taken of the heir, and the consideration is fair and adequate, the decree is for specific performance; but if advantage has been taken of his necessity, the contract is held as security for the return of the money actually advanced together with interest: Mastin v. Marlow, 65 N. C. 695.

The fact that an heir's expectancy is sold, assigned, or released to his ancestor does not invalidate the transaction. It is void in law, of course, for the same reason that would make it void if disposed

of to a third person; but, in equity, an heir's assignment, sale, or release of his expectancy to his ancestor, if fairly made, and sustained by a sufficient consideration, will be enforced: *Kinyon v. Kinyon*, 31 Abb. N. C. 76; 72 Hun, 452; *Powers' Appeal*, 63 Pa. St. 443; *Havens v. Thompson*, 26 N. J. Eq. 383; *Jones v. Jones*, 46 Iowa, 466; *Brands v. De Witt*, 44 N. J. Eq. 545; 6 Am. St. Rep. 909; *Galbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307; *Crum v. Sawyer*, 132 Ill. 443; *Gore v. Howard*, 94 Tenn. 577; *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134.

Thus, a son's release, or assignment, for a valuable consideration, of his expectant interest in his father's estate, though made to the father himself, may be enforced in equity after the latter's death: *Kinyon v. Kinyon*, 31 Abb. N. C. 76; 72 Hun, 452. A father may make a contract with his child which will bar all the latter's claim as heir to his father's estate; but such release by the child should be clear and unambiguous, and the intention manifest: *Powers' Appeal*, 63 Pa. St. 443. The child may, in consideration of moneys advanced to it by its father, or in consideration of the conveyance of certain property to it, agree to make no claim to a share of its father's estate, should the latter die intestate. Such agreement will debar the child from such claim, and effect will be given to it in equity, according to the intention of the parties: *Havens v. Thompson*, 26 N. J. Eq. 383; *Jones v. Jones*, 46 Iowa, 466. But, while an heir at law may, for a sufficient consideration release to his father his expectancy in the latter's estate, either real or personal, so that he will be estopped from establishing any claim thereto as one of his heirs at law or next of kin, such agreements, if they concern land, are, like others, subject to the statute of frauds, and not enforceable unless in writing: *Brands v. De Witt*, 44 N. J. Eq. 545; 6 Am. St. Rep. 909. On the contrary, it has been held that a contract made by a child with his father, in consideration of a conveyance of land to him by the father, that he will release to his brothers and sisters all of his expectancy in the residue of his father's estate, is not within the statute of frauds, or in conflict with the statute of wills: *Galbraith v. McLain*, 84 Ill. 379. Compare *Kershaw v. Kershaw*, 102 Ill. 307. If a prospective heir releases his expectancy in his father's estate by executed contract, the consideration of which is a present grant of real estate to him by the father, the contract will be enforced in a suit for partition of the residue of the lands of the estate: *Kershaw v. Kershaw*, 102 Ill. 307.

It is also competent for a husband, upon valuable and adequate consideration, to enter into a contract with his wife, and to release and relinquish to her all his right and interest, of every kind and nature, including his contingent right of dower, in all her lands, and his interest as her heir in her lands and personal estate; and when such contract is fairly made equity will enforce it against him: *Crum v. Sawyer*, 132 Ill. 443.

An advancement to a son, in full of all claims against the estate of the father, will not, after his death, prevent the son taking, as heir, a residuum not disposed of by will: *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; but, after a sale of land in partition proceed-

ings, in which all the heirs were made parties, it is admissible to show, before distribution, that certain of the heirs had, by writing under seal, released their shares in the estate of decedent, prior to the latter's death: *Estate of Summerville*, 129 Pa. St. 631.

With respect to the effect, on other heirs, of a release or relinquishment by an heir, to his ancestor, of the heir's expected inheritance, it was said by Mr. Justice Bailey, who delivered the opinion of the court in *Crum v. Sawyer*, 132 Ill. 443, 463: "The true view would seem to be, that a release by an heir of his expectancy, operates, not as a transfer or conveyance to either the ancestor or the other heirs of the estate which would descend to him upon the death of the ancestor, but rather as an extinguishment of his right to take any estate by descent. It obliterates the right to inherit to an extent substantially equivalent to its obliteration by the death of an heir expectant without issue before the death of the ancestor. The other heirs are thereby placed in the same position in which they would have been if such right had never existed, and they therefore inherit the entire estate, not upon the theory of an assignment to them of the estate in expectancy of the heir executing the release, but upon the theory of an extinguishment or obliteration of that estate."

Illustrative Cases of Enforcement in Equity.—If an agreement in relation to an estate in expectancy has been fairly made, upon sufficient consideration, and the parties have acted in good faith, and fully and fairly executed their agreement, a court of equity will enforce it: *Parsons v. Ely*, 45 Ill. 232, 244. So, where such an agreement is merely executory: *Parsons v. Ely*, 45 Ill. 232, 244; *Lee v. Lee*, 2 Duvall, 134; although the assignee of the expectancy was a young heir, dealing with an estate derived from his father, but still in the hands of others; and the fact that a source of gain to one of the contracting parties was unknown at the time of the contract, or became available afterward, does not authorize a court of equity to interfere to set the contract aside: *Meriweather v. Herran*, 8 B. Mon. 162. If a son sells out his prospective interest in his father's estate, with full knowledge of its probable value, and with his father's consent, a court of equity will not relieve him of his bargain, where it was entered into by the purchaser under circumstances of perfect fairness and good faith: *Lee v. Lee*, 2 Duvall, 134.

If a son, for a fair consideration, sells his interest in his father's estate, the father being then alive and cognizant of the transaction, and who agrees with the purchaser that he will give that son an equal interest under his will with the other children, which he does, the sale vests in the purchaser a valid interest in the property, good as against a judgment creditor of the seller: *Fitzgerald v. Vestal*, 4 Sneed, 257. An agreement between two sons, to divide, equally, whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise, from him, is not contrary to public policy, and will be enforced in equity: *Wethered v. Wethered*, 2 Sim. 183. So, a contract under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees that, when he shall obtain possession

of a tract of land which he expects his father to devise to him, he will convey it to the other, is not against good morals, and will be specifically enforced in a court of equity: *Lewis v. Madisons*, 1 Munf. 303. And, an agreement between two persons, having expectations from a third, to divide equally whatever he may leave them, is valid; *Beckley v. Newland*, 2 P. Wms. 182; *Harwood v. Tooke*, 2 Sim. 192. Contra, *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694.

A father executed a deed of a farm to his son, and left it with a third person to be delivered after the father's death, but not before, unless both father and son called for it. The deed was delivered after the father's death, and it was held that the title of the son took effect, by relation, from the time of the delivery of the deed to such third person; and that the son's quitclaim deed, executed between that time and the father's death, though importing a mere conveyance of the son's "right of expectancy" in the land, would pass his title: *Tooley v. Dibble*, 2 Hill, 641. An agreement in marriage articles to convey to the husband a third part of what shall come to the father of the wife on the death of his father, is good and will be specifically enforced in equity: *Hobson v. Trevor*, 2 P. Wms. 191.

Setting Aside, in Equity—Refusal of Relief.—A contract is not binding unless there is capacity to contract; an understanding and comprehension both of the nature and effect of the transaction. Hence an assignment of an expectancy in an estate will be set aside in equity, if it was executed by a woman whose mind was so impaired by age that she did not understand the nature of the assignment, although she did understand its effect; where she had not sufficient memory and mental vigor to understand whether she owed the debts named in the assignment, or, whether, in justice and equity, she ought to pay them; and where undue influence was exercised to procure the assignment: *King v. Davis*, 60 Vt. 502. To persons selling expectant interests, although they do not stand in the relation of expectant heirs, equity extends an anxious protection, and trivial circumstances added to inadequacy of price, will be sufficient to set such sales aside: *McKinney v. Pinckard*, 2 Leigh, 149; 21 Am. Dec. 601. The heirs of an idiot, whose estate was in the hands of a committee, being weak, illiterate, and necessitous, and having difficulty in procuring and perpetuating evidence of their relationship, employed an agent to transact the business for them, at a commission of ten per cent on the amount to be recovered. The agent afterward purchased their interest in the estate, at about one-fourth of its ultimate value. When the estate was recovered, he took from the heirs, in pursuance of his purchase, a conveyance of their interest, and a power of attorney to prosecute the decree, and to receive for his own use their shares of the estate yet to be accounted for. This contract was set aside in equity on the ground of gross inadequacy of price, connected with the weakness and necessities of the sellers; and on the further ground that the agent was legally incapacitated to purchase from his principal the estate which was the subject of the agency, so long as this relation of confidence continued: *Butler v. Haskell*, 4 Desaus. Eq. 654. It is not enough to

induce a court of equity to interfere, even in the case of an expectancy coupled with an interest, that a bargain is hard and unreasonable, nor does mere inadequacy of price form a distinct ground of equitable relief: *Dunn v. Chambers*, 4 Barb. 378. "In most of the instances," said Harria, presiding justice, in *Dunn v. Chambers*, 4 Barb. 376, 379, "in which a party has been relieved from his own improvident bargain, there have been some circumstances of a suspicious character connected with the transaction, or there has been something in the relation which the parties sustained to each other, which rendered it inequitable that the party, against whom relief was sought, should retain the advantage he had acquired by his bargain." It is not, therefore, unusual for a court of equity, where the proof of actual fraud is not clear and satisfactory, to make the conveyance subservient to the whole equity of the case; and, if the evidence is insufficient to justify a decree declaring a deed void as against the grantor, as having been fraudulently obtained, and yet it was obtained under such circumstances as to render it at least unfair for the defendant to retain the full advantage of his bargain, the court may direct the deed to stand as security only, for the defendant's indemnity, to the extent of the sum actually due: *Dunn v. Chambers*, 4 Barb. 376.

An assignment, by an insolvent heir apparent, of his estate in expectancy, without consideration, is fraudulent as to his existing creditors, who may have it set aside. The property will then descend subject to the payment of their debts: *Read v. Mosby*, 87 Tenn. 759. Upon equitable principles, a voluntary assignment, even of an expectant interest in an estate, though in legal form, is not regarded, if unaccompanied by any other act, as effectual to pass an equitable interest: *Meek v. Kettlewell*, 1 Phil. Ch. 342.

For illustrative cases in which relief has been given where there was a "hard bargain" concerning an heir's dealings with his expectant estate, see *Butler v. Duncan*, 47 Mich. 94; 41 Am. Rep. 711, and extended note thereto citing some comparatively recent English cases; *Nevill v. Snelling*, L. R. 15 Ch. Div. 679; *Fry v. Lane*, L. R. 40 Ch. Div. 312; *O'Rourke v. Bolingbroke*, L. R. 2 App. Cas. 814.

In Kentucky, the specific execution of contracts for the sale of expectancies will not be enforced on the ground that expectancies in an estate are not the subjects of valid sales: *Lowry v. Spear*, 7 Bush, 451. A wife's mortgage of her expectant interest in her father's estate, upon his death, to secure an antecedent debt of her husband, will not be enforced, the mortgagee not being a purchaser for value; *Bayler v. Commonwealth*, 40 Pa. St. 37; 80 Am. Dec. 551. Defendant, desiring to marry against the wish of his father, and being threatened with disinheritance, entered into a verbal agreement with the plaintiff, his sister, that in case his father should will his entire property to either, that one would divide with the other. The entire property was afterward willed to defendant. The agreement was held to be against public policy, upon the ground that it was subversive of the rights, interests, and authority of the parent, and it was considered that a bill for specific performance would not lie: *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694. Contra, *Lewis v.*

Madisons, 1 Munf. 303; Harwood v. Tooke, 2 Sim. 192; Beckley v. Newland, 2 P. Wms. 182. A husband has no power to make a valid relinquishment of his wife's expectancy from her father's estate: Bishop v. Davenport, 58 Ill. 105.

Assent of Ancestor.—Equity will not protect an heir who has sold, assigned, or released his expectancy in an estate, where the disposition or transfer was made with the ancestor's consent and it was sanctioned or adopted by him: Fitzgerald v. Vestal, 4 Sneed, 257; King v. Hamlet, 3 Clark & F. 218; Bligh, N. R., 575; 4 Sim. 223; 2 Mylne & K. 456; Lee v. Lee, 2 Duvall, 134. But want of consent on the part of an insane ancestor, has been held, in an action to cancel a conveyance made by an heir, of his expectant interest in the ancestor's estate, not to invalidate such conveyance: Hale v. Hollon, Tex. Civ. App., May 20, 1896. In some of the cases it is held, at law, that contracts for the conveyance of expectant interests in ancestor's estates, without the knowledge and consent of the latter, are illegal as being contrary to public policy; that a contract for the conveyance of an expectant interest in an ancestor's estate cannot be enforced until it is shown that there was neither fraud nor oppression, and that the ancestor had knowledge of and consented to such contract; and that the fact that he was incapable of consenting because of his insanity does not constitute an exception to the rule requiring his assent: McClure v. Raben, 133 Ind. 507; 36 Am. St. Rep. 558; 125 Ind. 139. So, where such contracts are looked upon as invalid at law, a son's sale of his expectancy in his father's estate, made with the assent of the father, does not divest him of any right to the property, nor confer any upon the son: Wheeler v. Wheeler, 2 Met. (Ky.) 474; 74 Am. Dec. 421; but a manifest distinction is noted between a sale by an heir or devisee to a purchaser, where the ancestor gives a mere verbal assent, but parts with no right of disposing of his estate as he chooses, and a case where he divests himself of that right, as to a portion of his estate, by a written covenant agreeing to secure it to a child named therein. In case of a sale of the interest of one expectant devisee or heir to another, the ancestor may, in writing executed and delivered, divest himself of the right to make any other disposition of the specified share of his estate than that stipulated for in the writing: McBee v. Myers, 4 Bush, 856; but is not bound in the absence of such a covenant: Alves v. Schlesinger, 81 Ky. 290.

In those cases where the disposition of an expectancy in an estate is recognized as valid at law, it is held that a covenant by an heir expectant, that he will convey whatever estate comes to him by descent or otherwise, is valid, if no advantage is taken of the covenantor, and the transfer is made with the knowledge and consent of the ancestor: Fitch v. Fitch, 8 Pick. 480; Jones v. Jones, 46 Iowa, 466. A bond by an heir apparent that he will devise an estate which may come to him by descent is valid, if the bargain is not unconscionable, or obtained by fraud, or by taking unjust advantage of the necessities of the heir, and the bond is executed fairly, on adequate consideration, and with the assent of the ancestor: Jenkins v. Stetson, 9 Allen, 128.

Warranty and Estoppel.—Notwithstanding the strictness, particularly in the earlier cases in the courts of common law, with respect to assignments of equitable interests, we have shown that the rule at the common law has been much relaxed, if not almost disregarded, by the courts of equity, which have, from a very early period, held that assignments for valuable consideration, of a mere possibility, such as an heir's expectancy in an estate, are valid and will be carried into effect upon the same principle as they enforce the specific performance of an agreement, when not contrary to their own rules or to public policy. But the strict rule at law that there cannot be a grant of a mere possibility, unless coupled with a vested interest, is not now so rigidly enforced as formerly. For example, there are cases holding that the law will protect an equitable assignment by an heir of his expectancy: *Stevens v. Palmer*, 15 Gray, 505; *Fitch v. Fitch*, 8 Pick. 480; *Jenkins v. Stetson*, 9 Allen, 128; *Lewis v. Madisons*, 1 Munf. 303. And a further modification or relaxation of the strict rule at law, which does not recognize an assignment of a mere possibility not coupled with an interest, such as the expectancy of an heir in an estate, is attained by the application of the doctrine of estoppel arising on a covenant of warranty, or nonclaim, and upon recitals in the instrument of disposition or transfer. The conveyance or release of an expectancy in land by an heir, is the conveyance or release of a mere naked possibility not coupled with an interest, and passes no estate or interest in the land; it cannot, therefore, operate to defeat the grantor's title, afterward acquired by descent, except by way of legal or equitable estoppel. It follows that if the conveyance or release contains no covenants of warranty, or recitals, and there are no acts of the grantor or releasor amounting to an equitable estoppel, he is not estopped from asserting an after-acquired title: *Hart v. Gregg*, 32 Ohio St. 502; *McCrackin v. Wright*, 14 Johns. 183; *Bohon v. Bohon*, 78 Ky. 408, 412; *Avery v. Akins*, 74 Ind. 283; *McClure v. Raben*, 125 Ind. 139; *Pelletreau v. Jackson*, 11 Wend. 110; *Pike v. Galvin*, 29 Me. 183.

If one of the children of a deceased husband executes a warranty deed to her expectant interest in the widow's one-third, and dies before the widow, such warranty deed does not bind her children, and they are not estopped to set up their title as the heirs of the widow, upon the latter's death: *Habig v. Dodge*, 127 Ind. 31; *Bohon v. Bohon*, 78 Ky. 408, 412; *Russ v. Alpaugh*, 118 Mass. 369, 376. While the deed of an heir apparent conveying the estate out of which his interest is to arise may operate by way of estoppel against him, it does not so operate upon his heirs against whom there is no covenant of warranty: *Bohon v. Bohon*, 78 Ky. 408; *Goodtitle v. Morse*, 3 Term Rep. 365. A mere release or quitclaim deed, even of an expectant interest in land, is effectual to pass the estate which the grantor has at the time it is made, and no more; it does not estop him from asserting an after-acquired title: *Beyan v. Upland*, 101 Ind. 477; *Avery v. Akins*, 74 Ind. 283; *Graham v. Graham*, 55 Ind. 23; *Bell v. Twilight*, 26 N. H. 401; *Dart v. Dart*, 7 Conn. 250; cases cited in note to *Trull v. Eastman*, 37 Am. Dec. 130. The grantees in an heir's

conveyance of an expectant interest in his ancestor's estate, never in possession thereunder, cannot, as such, or by way of estoppel, assert a title or interest in the land, against one in actual possession, under a legal title, although such title is, as against the grantor, his heirs, and assigns, fraudulent and void: *Hart v. Gregg*, 32 Ohio St. 502, 513. So, although a covenant of warranty in a conveyance, by an heir, of his expectant interest in an estate, would bar him and his issue, by way of estoppel, from setting up title to the estate, such estoppel does not affect a purchaser under a judgment entered before the execution of the conveyance creating the estoppel: *Jackson v. Bradford*, 4 Wend. 619.

On the other hand, if the grantor in a sale of his expectant interest in an estate covenants that he will not claim the interest himself and will warrant it against all claims made under him by others, the grantee, even at law, will acquire the estate which his grantor subsequently obtains in the estate. In other words, a sale or release, with covenants of warranty, by an heir apparent, of his estate in expectancy, will bar his claim by descent on the death of his ancestor; *Trull v. Eastman*, 3 Met. 121; 37 Am. Dec. 126; *Curtis v. Curtis*, 40 Me. 24; 63 Am. Dec. 651. This subsequently acquired title inures to the benefit of the grantee, or releasee, on the principle of estoppel, and the reason why this is allowed is to avoid circuity of action: See monographic note to *Trull v. Eastman*, 37 Am. Dec. 129, on grant by heir apparent of his interest in his ancestor's estate; *Coke*, 265a; *McCrackin v. Wright*, 14 Johns. 193; *Bohon v. Bohon*, 78 Ky. 408, 412; *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Fitch v. Fitch*, 8 Pick. 480; *House v. McCormick*, 57 N. Y. 310; *Smith v. Baker*, 1 Young & C. Ch. 223.

A warranty deed of the grantor's expectant interest in the estate of his ancestor, made in good faith, upon adequate consideration, and with the ancestor's consent, passes such grantor's after-acquired inheritance: *Hale v. Hollon*, Tex. Civ. App., May 20, 1896. A person under the belief that he had the fee simple in an estate subject to a life estate in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title and for further assurance. It turned out that at the time of the conveyance, the mother had the fee simple, which upon her death descended to the grantor, as her heir at law. It was held that, although no estate passed by the conveyance, yet the transaction amounted to a contract for sale of the specific estate, and that the grantor, unless he could set aside the contract for fraud, could be compelled in equity to carry it into execution: *Smith v. Baker*, 1 Young & C. Ch. 223.

If one undertakes to convey land by deed, and has no interest in it at the time, but afterward acquires a title by descent or purchase, such deed, where it contains a warranty, passes an interest and a title from the moment such estate comes to the grantor, not only against the grantor and those claiming under him, but also against strangers who come in after the estoppel: *Somes v. Skinner*, 3 Pick. 52. The principle upon which estoppels rest is that when a man has

by his deed averred or affirmed or covenanted, or by his act in pais admitted, that a fact is true, he shall not afterward be permitted to deny, or contradict, or disprove it. The facts thus affirmed or admitted, cannot be disproved. They are conclusively admitted: *Flagg v. Mann*, 14 Pick. 467, 481.

Generally speaking, the covenant of nonclaim is treated as equivalent to the ordinary covenant of warranty, and held to have the same operation by way of estoppel and of running with the land: *Note to Trull v. Eastman*, 37 Am. Dec. 130. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will either be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it: *Pike v. Galvin*, 29 Me. 183, 184, reviewing conflicting authorities. Compare *Comstock v. Smith*, 13 Pick. 116; 23 Am. Dec. 670. Where an heir apparent conveys his estate in expectancy and covenants in the deed, that neither he nor those claiming under him, will ever claim any right in such estate, this covenant, which amounts to a warranty, will bar him and those claiming under him, when the right descends: *Trull v. Eastman*, 3 Met. 121; 37 Am. Dec. 126. So, a release by an heir apparent of his estate in expectancy, with a covenant of nonclaim, made fairly and with the consent of his ancestor, precludes the releasor from afterward setting up a claim to any part of his ancestor's estate, either as devisee or heir: *Curtis v. Curtis*, 40 Me. 24; 63 Am. Dec. 651.

An heir may, by releasing to the ancestor his expected share in the ancestor's estate, thereby estop himself from claiming as heir any portion of such estate as might otherwise, in the future, vest in him as such heir: *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134. He is estopped, while he retains the benefit received, and his release remains in full force, to institute a contest over the ancestor's will, especially where he has covenanted not to contest it: *Gore v. Howard*, 94 Tenn. 577; *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134.

It is evident that the deed, by an heir, of his expectant interest in an estate, passes nothing. for there is nothing in existence to pass, but if the deed is with warranty, an estoppel is raised to claim the future estate; and a deed containing express covenants of warranty or quiet enjoyment operates as an estoppel against a claim of the grantor, or his privies, to a subsequently acquired estate, as well where the grantor had a present right or interest, which passed at the time of the grant, as when nothing whatever passed: *House v. McCormick*, 57 N. Y. 310. It is not our purpose, however, to go into the law of possibilities coupled with an interest. They are, we apprehend, whatever may be their form, subject to the same rule of estoppel as applies to the transfer of property in existence, where the instrument of transfer contains covenants of warranty: *Habig v. Dodge*, 127 Ind. 31; *Jerauld v. Dodge*, 127 Ind. 600; *Robertson v. Wilson*, 38 N. H. 48; *Read v. Fogg*, 60 Me. 479; *Rosenthal v. Mayhugh*, 33 Ohio St. 155. Contingent remainders and executory interests were not assignable at the common law, though they might, as possibilities, coupled with an interest, be devised under the English statute of wills, or released at common law, or bound by a convey-

ance operating by way of estoppel: *Bartholomew v. Muzzy*, 61 Conn. 887; 29 Am. St. Rep. 206.

Consideration—Burden of Proof—Terms of Relief.—As the policy of this country favors the free alienation of property, it is a rule of equity that mere inadequacy of price does not form a distinct ground of equitable relief; and this rule appears to be applicable to an heir's sale, assignment, or release of his expectant interest in his ancestor's estate: *Lee v. Lee*, 2 Duvall, 134; *McKinney v. Pinckard*, 2 Leigh, 149; 21 Am. Dec. 601; *Parmelee v. Cameron*, 41 N. Y. 392; *Wormack v. Rogers*, 9 Ga. 60; *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81; *Cribbins v. Markwood*, 13 Gratt. 495; 67 Am. Dec. 775; *Dunn v. Chambers*, 4 Barb. 376; although it is held in *Nimmo v. Smith*, 7 Tex. 26, to be incumbent on the party dealing with heirs, reversioners, or remaindermen to show that the dealing is fair and for an adequate consideration. One of the grounds, however, upon which the court set aside the conveyance of necessitous heirs in *Butler v. Haskell*, 4 Desaus. Eq. 654, was gross inadequacy of price; and the court, in *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375, granted relief from a contract, because of the rate of interest exacted.

The circumstance of inadequacy of consideration, however, taken in connection with other facts charged, may furnish such a vehement presumption of fraud as to authorize a court of equity to set the transaction aside: *Wormack v. Rogers*, 9 Ga. 60; *Brown v. Hall*, 14 R. I. 249; 51 Am. Rep. 375. Gross inadequacy of consideration, in a sale by an heir of an expectant interest in an estate, connected with circumstances evincing an unconscientious advantage taken of the heir, where he is of extravagant and profligate habits, will afford good ground, in a court of equity, for setting the contract aside: *McKinney v. Pinckard*, 2 Leigh, 149; 21 Am. Dec. 601; *Wormack v. Rogers*, 9 Ga. 60. As inadequacy of price is not fraud, mere inadequacy of price is not a sufficient ground for avoiding a sale, unless the inadequacy is so gross as to furnish presumptive evidence of actual fraud, or is, in fact, coupled with fraud, surprise, ignorance, mistake, delusion, or imbecility: *Parmelee v. Cameron*, 41 N. Y. 392, 396. Hence a court of equity will not, in the absence of fraud, or undue influence, interfere to set aside a sale made by a legatee of a fixed and certain amount of money, payable, with interest, at a time stated after the testator's death; and the fact that the legatee was a "reckless, dissipated, improvident, and weak-minded young man," at the time of the sale, or that the sale was made some years before the legacy was due, and for an inadequate consideration, would not induce the court to set it aside: *Parmelee v. Cameron*, 41 N. Y. 392. An unexecuted contract will not be enforced in a court of equity, if it seems to be unconscionable; but after it has been executed, proof of gross inadequacy of consideration, in an attack upon it, can be regarded only as evidence of fraud, and of itself is not sufficient to justify a cancellation of the instrument: *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81. Inadequacy of price is not alone ground, in this country, for rescinding the sale of a reversion by a young man who had just attained his majority, but it may, with other circumstances, be evidence of fraud; and retention of a part of price by

purchaser is no ground of rescission of a sale of a reversion, especially where it was withheld by consent: *Cribbins v. Markwood*, 13 Gratt. 495; 67 Am. Dec. 775. The sum of six hundred and twenty-five dollars is a sufficient consideration for the assignment of an expectancy in an estate, where the interest in the estate is seven hundred and seventy-one dollars: *Fritz's Estate*, 160 Pa. St. 156. It is only the party defrauded, or those claiming under him, who can take advantage of the inadequacy of consideration or other circumstances of fraud attending the execution of a deed conveying an inheritance: *Davidson v. Little*, 22 Pa. St. 245; 60 Am. Dec. 81.

In this country, the fact that a bargain is hard and unreasonable, does not, in general, induce a court of equity to interfere to protect an heir in his contract: *Dunn v. Chambers*, 4 Barb. 376; *Parmelee v. Cameron*, 41 N. Y. 392, 395. "Every man is presumed to be capable of managing his own affairs, and whether his bargains are wise or unwise is not ordinarily a legitimate subject of inquiry in either a court of legal or equitable jurisdiction": *Parmelee v. Cameron*, 41 N. Y. 392, 395; but a court of equity has power to set aside an unconscionable bargain: *Brown v. Hall*, 14 R. I. 249; 51 Am. Rep. 375; though the doctrine of unconscionable bargains has nothing to do with fraud: *Bowes v. Heaps*, 3 Ves. & B. 117, 119. In England, it has been laid down, in case after case, that where there is a dealing of this kind, the court will look at the reasonableness of the bargain, and, if it is what is called "a hard bargain," set it aside, especially in the case of a bargain by an expectant heir: *Beynon v. Cook*, L. R. 10 Ch. App. 389, 391; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 489; *Freeman v. Bishop*, 2 Atk. 39; *Fry v. Lane*, L. R. 40 Ch. Div. 312.

A purchase of an heir's expectancy is not set aside merely for undervalue, there being no fraud: *Nichols v. Gould*, 2 Ves. Sr. 422; *Griffith v. Spratley*, 1 Cox, 383, 389. Inadequacy of price, however, is alone a sufficient ground of defense to a bill in equity, by a purchaser, for specific performance, where the party contracting to sell was an expectant heir: *Ryle v. Brown*, 13 Price, 758.

But inadequacy of consideration, when gross, thus showing imposition or oppression, or where there is fraud, is good ground for cancellation: *Underhill v. Horwood*, 10 Ves. Jr. 209; *Stilwell v. Wilkins*, Jac. 280; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Gowland v. De Faria*, 17 Ves. Jr. 20, 25. If a written agreement is entered into for the purchase of an heir's expectancy at a price far beyond its value, but without any circumstances of fraud or surprise, the court will not decree a specific performance of such a contract, but, on the other hand, will not rescind it: *Day v. Newman*, 2 Cox, 77.

If an heir sells, assigns, or releases his expectant interest in his ancestor's estate, upon inadequate consideration he may have the contract rescinded in equity upon repayment of the consideration received, with interest: *Beynon v. Cook*, L. R. 10 Ch. App. 389, 393; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 489.

A contract for the conveyance of an expectant interest in an ancestor's estate cannot be enforced against the heir until it is shown that there was neither fraud nor oppression: *McClure v. Raben*, 133

Ind. 507; 36 Am. St. Rep. 558; 125 Ind. 139; and, in such a case, the absence of fraud, good consideration, and adequacy of price, should be proved affirmatively by the party claiming the benefit of the contract, as where a legacy has been assigned: *Bacon v. Bonham*, 33 N. J. Eq. 614; *Nimmio v. Davis*, 7 Tex. 26. A release from a child to a father of its estate in expectancy should be clear and unambiguous, and the intention be manifest: *Powers' Appeal*, 63 Pa. St. 443. If a father assigns his expectant interest in an estate to his own son, the assignment will be sustained, where both father and son testify that the assignment was made in consideration of money furnished by the son, and there is no evidence to impeach the veracity of either witness: *Fritz's Appeal*, 160 Pa. St. 156. If an heir's sale of his expectant interest in an estate appears to have been fair, we understand that, in this country, the contract will be enforced in equity, where the consideration is valuable, though inadequate, if not grossly so.

But, in England, courts of equity have extended to heirs who deal with their expectancies, during their ancestors' lives, a degree of protection, approaching nearly to an incapacity to bind themselves by any contract: *Peacock v. Evans*, 16 Ves. Jr. 512, 514. It is there incumbent upon those who have dealt with an heir relative to his expectancy, to make good the bargain. He must be able to show that a full and adequate consideration was paid. This is considered a heavy burden imposed upon a purchaser, but such burden is recognized, and treated as an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In all cases relative to the sale by an heir of reversionary interests, the issue is upon the adequacy of the price: *Gowland v. De Faria*, 17 Ves. Jr. 20, 24. The proposition in this case, that in a transaction with an expectant heir, it is necessary for the party seeking the benefit of the transaction to show that he gave a fair price, has been "the subject of much observation" since the decision was rendered, and "it has been considered as interfering a good deal with that proper discretion which persons, who are capable, according to the law of this country, of disposing of their property, ought to be at liberty to exercise. At the same time, it does establish a rule, which has the effect of protecting persons who are, generally speaking, very much in need of protection." But whatever may be thought of the policy of the rule, it exists and has been recognized: *Earl of Aldborough v. Trye*, 7 Clark & F. 436, 457, and collected cases in note thereto. It was the rule in England that not only would specific performance be refused but that the purchase of a reversion from an expectant heir would be set aside in equity, unless the purchaser, having the burden of proof, showed that the transaction was entered into in good faith, and that the sale was made upon adequate consideration: *Ryle v. Brown*, 13 Price, 758; *Bromley v. Smith*, 26 Beav. 644; *Perfect v. Lane*, 30 Beav. 197; *Hannah v. Hodgson*, 30 Beav. 19; *Edwards v. Burt*, 2 De Gex, M. & G. 55, and collected cases in note thereto; *Potts v. Curtis*, 1 Younge, 543; *Batty v. Lloyd*, 1 Vern. 141, note; *Moth v. Atwood*, 5 Ves. Jr. 845; *St. Albyn v. Harding*, 27 Beav. 11; *Twisleton v. Griffith*, 1 P. Wms. 310, 312; *Shelly v. Nash*, 3 Madd. 232; *Gwynne v. Heaton*, 1 Bro. Ch. 1; *Earl*

of *Portmore v. Taylor*, 4 Sim. 182. In accordance with this rule, and the principle involved, courts of equity relieved heirs from a very advantageous purchase of their expectant interests in their ancestors' estates, as well as from unreasonable or unconscionable bargains, though such bargains were obtained from the heir during the lifetime of his ancestor, and there was no fraud: *Peacock v. Evans*, 16 Ves. Jr. 512; *St. Albyn v. Harding*, 27 Beav. 11; *Berny v. Pitt*, 2 Vern. 14; *Cole v. Gibbons*, 3 P. Wms. 293; *Nevill v. Snelling*, L. R. 15 Ch. Div. 679; *Varnees' case*, Freem. Ch. 63; *Wiseman v. Beake*, Freem. Ch. 111. The courts would, of course, also grant relief in such cases where there was imposition or fraud, or the heir ignorant of his rights: *Waller v. Dalt*, 1 Dick. 8; *Roche v. O'Brien*, 1 Ball & B. 330; *Baugh v. Price*, 1 Wils. 320; *Evans v. Llewellyn*, 1 Cox, 333; *Wharton v. May*, 5 Ves. Jr. 27; for where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a court of equity may set aside the purchase as fraudulent, even after the purchaser's death: *Gould v. Okeden*, 4 Brown P. C. 193.

The early policy of the English nation was "to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from a dependence on his ancestor who probably would have supported him, and, by feeding his extravagancies, tempting him, in his father's lifetime, to sell the reversion of that estate, which was settled upon him; for as much as this tended to the manifest ruin of families; therefore the policy of the nation thought fit, though it at first prevailed with some difficulty, to put a stop to so mischievous a practice, by setting aside all these bargains with young heirs, for reversions": *Cole v. Gibbons*, 3 P. Wms. 290, 293. The rule requiring a purchaser to prove that he had given an adequate consideration applied to post-obit securities: *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 490; *Curling v. Townshend*, 19 Ves. Jr. 628; *Courteney v. Godschall*, 9 Ves. Jr. 473; *Townsend v. Lowfield*, Belt's Supp. 31; *Evans v. Chesshire*, Belt's Supp. 300; *Hill v. Caillovel*, 1 Ves. Sr. 122.

The fact that a reversion was dependent on contingencies, which did not admit of estimation by actuaries, did not relieve the purchaser from the onus of showing that fair value was given: *Talbot v. Stainforth*, 1 John. & H. 484. Neither was the application of the rule that a person dealing with an expectant heir for his reversion must prove the fairness of the transaction, prevented by the fact that the transaction was a charge and not a sale; or that the expectant heir was a person of mature age; or that he perfectly understood the nature and extent of the transaction. And, it was not necessary for the heir to show that he was in pecuniary distress at the time: *Bromley v. Smith*, 26 Beav. 644.

The requirement of a person who sought the benefit of a dealing with an heir for his expectancy was to show that he gave an adequate consideration, which was the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables: *Earl of Aldborough v. Trye*, 7 Clark & F. 436. The rule that a fair price must be given, was said, in the case just cited, to be a sufficient protection to heirs expectant or reversioners; but that the rule of full value would not be any protection, as in that

case, they could not deal with their expectancies, or sell their interest at all, and a sale by public sanction is within the proper rule on the plain principle that the sum which the thing will fetch is the sum which it is worth: *Earl of Aldborough v. Trye*, 7 Clark & F. 436, 457, 460, 465. Compare *Edwards v. Burt*, 2 De Gex, M. & G. 55.

The rule, allowing sales of reversionary interests to be set aside for inadequacy of consideration, has, however, been changed in England by statute. In 1867, it was enacted by 31 Victoria, chapter 4, that "no purchase, made bona fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue"; and the word "purchase" was defined in the statute to include "every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired." But the doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by this alteration of the law as to sales of reversionary interests, as the act is carefully limited to purchases "made bona fide and without fraud or unfair dealing," and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief: *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 490; *Tyler v. Yates*, L. R. 6 Ch. App. 665.

The usury laws of England, having proved to be "an inconvenient fetter upon the liberty of commercial transactions," as well as the arbitrary rule of equity as to sales of reversions, which was an impediment to fair and reasonable, as well as to unconscionable, bargains, have also been abolished by the legislature. But the abolition of the usury laws "still leaves the nature of the bargain capable of being a note of fraud in the estimation of the court," and does not, therefore, affect the doctrines of equity as to the relief of expectant heirs from unconscionable bargains: *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 490; *Croft v. Graham*, 2 De Gex, J. & S. 155; *Beynon v. Cook*, L. R. 10 Ch. App. 389; *Tyler v. Yates*, L. R. 6 Ch. App. 665; L. R. 11 Eq. 265; *Miller v. Cook*, L. R. 10 Eq. 641; *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814. The principle on which a court of equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money applies also to the case of money lent, on unconscionable terms, not fully understood by the borrower, and known by the lender not to be fully understood by him, especially where the heir is a minor: *Nevill v. Snelling*, L. R. 15 Ch. Div. 679; *Croft v. Graham*, 2 De Gex, J. & S. 155.

In England, mere inadequacy of price will entitle an expectant heir to apply to a court of equity to set aside, on terms, the sale of a reversion, and the onus of proving the transaction to be fair, and the price sufficient, is on the purchaser: *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814; and the general result of the cases is, that expectant heirs, dealing with their expectancy, are entitled, for mere inadequacy of price, to have the contract rescinded, upon terms of redemption: *Beynon v. Cook*, L. R. 10 Ch. App. 389; *Tyler v. Yates*, L. R. 6 Ch. App. 665; *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814; *Croft v. Graham*, 2 De Gex, J. & S. 155; *Davis v. Duke of Marlbor-*

ough, 2 Swanst. 108, 166, and cases cited in note at 139; *St. Albyn v. Harding*, 27 Beav. 11; *Wharton v. May*, 5 Ves. Jr. 27; *Purcell v. McNamara*, 14 Ves. Jr. 91; *Peacock v. Evans*, 16 Ves. Jr. 512; *Gowland v. De Faria*, 17 Ves. Jr. 20. The purchaser in such cases is regarded as a mortgagee: *Peacock v. Evans*, 512. "No one can come into a court of equity, to be relieved against an oppressive deed, even in the character of heir apparent dealing for his expectations, except on tender of the purchase money and interest": *Davis v. Duke of Marlborough*, 2 Swanst. 108, 166.

What Property Passes—Creditors—Purchasers—Age of Heir.—A release of all the right, title, or interest of the releasor in his father's estate, whether the same fall to him by will or heirship, embraces all the right which he may afterward acquire as well as what present right he has: *Trull v. Eastman*, 8 Met. 121; 37 Am. Dec. 128. Where an heir of an estate was indebted to the deceased in a sum which cannot otherwise be made, the administrator may subject his interest in the real estate to the payment of such indebtedness, if it has not been transferred in good faith to an innocent party. Where this has been done, the administrator cannot reach the heir's interest, as the debt is not a lien upon it: *Towles v. Towles*, 1 Head, 600. The purchaser of the estate in expectancy of an heir apparent takes it subject to advancements made to the heir, but not subject to debts due from the latter to the estate of the ancestor: *Steele v. Frierson*, 85 Tenn. 430.

A purchaser from an heir stands in the same relation to the estate as did the heir. He receives whatever interest the heir has in the estate. The purchaser may set up advancements to the other heirs; and, if the heir from whom he purchases has been advanced, that fact may be shown to reduce the interest of the heir, and likewise reduce the interest received by the purchaser. So, if the purchaser alleges that he purchased of the heir all of the real estate described in the complaint, in good faith, and for a valuable consideration, he has the right to allege and prove such facts as establish the title of the heir, from whom he purchased, to all of the real estate: *Duncan v. Henry*, 125 Ind. 10.

In none of the English cases, concerning dealings with an heir concerning his expectant interest in an estate, does the age of the expectant heir appear to have been regarded as a matter of importance, and rules for the protection of heirs dealing with their expectant estates are applied irrespective of age: *Bromley v. Smith*, 26 Beav. 644, 663. An infant, on coming of age, may ratify securities given by him during his minority, without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction: *Kay v. Smith*, 21 Beav. 522.

In this country, as well as in England, such dealings, particularly by young and expectant heirs or persons in necessitous circumstances, "are looked upon with jealousy, and will be closely scrutinized; but we know of no rule of law which pronounces the transfer of an inheritance, though made by an infant heir, to be absolutely void: *Fitzgerald v. Vestal*, 4 Sneed, 257; *Meriweather v. Herran*, 8 B. Mon. 162; and we apprehend that the rule of law which permits an infant

to ratify or repudiate his contracts after minority has ceased, applies as well to contracts for the sale, release, or assignment of an inheritance, as to other contracts. Thus a minor is bound by his contract unless he disaffirms it within a reasonable time after he attains his majority; and, if he enters into a contract with his father respecting his share in the latter's estate, which contract he fails to disaffirm within six months after he becomes of age, he is held, in Iowa, not to be entitled to disaffirm it after that length of time has elapsed: *Jones v. Jones*, 46 Iowa, 466.

Possibilities Coupled with an Interest.—At common law, contingent remainders and executory interests were not assignable, though they might, as possibilities coupled with an interest, be devised under the English statute of wills, or be released at common law, or be bound by a conveyance operating by way of estoppel; and contracts, and assurances relating to them, based upon valuable consideration, might generally be enforced in equity: *Bartholomew v. Muzzy*, 61 Conn. 387; 29 Am. St. Rep. 206; *Watson v. Dodd*, 68 N. C. 528, 530; *Jones v. Roe*, 3 Term Rep. 88, 98. In this country, all contingent and executory interests, such as contingent remainders and executory devises to persons who are certain, and other possibilities coupled with an interest, are assignable, at least, in equity: *Nimmo v. Davis*, 7 Tex. 26; *Fortescue v. Satterthwaite*, 1 Ired. 566, 570; *Bodenhamer v. Welch*, 89 N. C. 78; *Miller v. Emans*, 19 N. Y. 384; *Watson v. Smith*, 110 N. C. 6; 28 Am. St. Rep. 665; *Brown v. Dail*, 117 N. C. 41, 43; *Whelan v. Phillips*, 151 Pa. St. 312, 322; monographic note to *Snelling v. Lamar*, 17 Am. St. Rep. 839, 843, on contingent remainders, how barred, defeated, or conveyed: *Wood v. Mather*, 88 Barb. 473, 482; *Hoyt v. Hoyt*, 61 Vt. 413; *Cribbins v. Markwood*, 13 Gratt. 495; 67 Am. Dec. 775; *Caulfield v. Van Brunt*, 173 Pa. St. 428; *Coverdale v. Aldrich*, 19 Pick. 391. A wife may release her dower to her husband: *Dakin v. Dakin*, 97 Mich. 284; and may bar herself, by way of equitable estoppel, from asserting her right to have it assigned upon her husband's death: *Rosenthal v. Mayhugh*, 33 Ohio St. 155. The claim to a legacy is an assignable interest, and the assignment passes the whole right of the assignor: *King v. Berry*, 3 N. J. Eq. 44; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Farmelee v. Cameron*, 41 N. Y. 392; *Bldgeway v. Underwood*, 67 Ill. 419.

The assignment of a contingent remainder or an executory devise, free from fraud or imposition, and for a valuable consideration, will be upheld in equity, though it may be void in law. It is, at least, an assignment of "a possibility coupled with an interest": *Watson v. Smith*, 110 N. C. 6; 28 Am. St. Rep. 665; *Brown v. Dail*, 117 N. C. 41, 43; *Nimmo v. Davis*, 7 Tex. 26. All contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent and devisable and assignable: *Nimmo v. Davis*, 7 Tex. 26. When the person is ascertained who is to take if the event happens, a contingent remainder may be granted, and the grantee takes the place of the grantor, with his chance of having the estate: *Bartholomew v. Muzzy*, 61 Conn. 387; 29 Am. St. Rep. 206. All contingent and executory estates, and possibilities coupled with an interest, where the person who is to take is certain, may be effectua-

ally conveyed before the contingency upon which they depend takes effect: *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365. A devise to three sons and four daughters, of real estate, in equal shares, with a provision that, if either should die without lawful issue, his or her shares should be divided among the survivors, took effect in 1810, and the court in *Miller v. Emans*, 19 N. Y. 384, held that the future contingent interest of the devisees severally, while all were living, was not a mere naked possibility, but passed by release from some of them to the others: *Miller v. Emans*, 19 N. Y. 384; overruling *Pelletreau v. Jackson*, 11 Wend. 110; *Jackson v. Waldron*, 13 Wend. 178; *Edwards v. Varick*, 5 Denio, 664. The New York statute abrogates all distinctions as to expectant estates, making them descendible, devisable, and alienable. It "gives to all expectant estates, of whatsoever description, and whether vested or contingent, and whether contingent upon an event which may never happen, or by reason of uncertainty in the person, the character or quality of alienability": *Moore v. Littel*, 41 N. Y. 66, 84, per Woodruff, J. And, with respect to the release of possibilities, Selden, J. said, in *Miller v. Emans*, 19 N. Y. 384, 394: "Whenever this subject shall be fully examined it will, I think, be found that any and every contingent right, however uncertain, may be released to a party already seised of a present estate in the premises in possession; and that the mere remoteness of the contingency affords no objection to its being so released, provided the right can be said to have any present existence at all."

A legatee under a will has, before administration, an inchoate title derived from the will, which may be assigned: *Cecil v. Rose*, 17 Md. 92; and, if an heir at law, before distribution of an estate, conveys away his interest, the power of the court of probate to order a distribution is not affected by it: *Holcomb v. Sherwood*, 29 Conn. 418

TAYLOR v. OWENSBORO.

[98 KENTUCKY, 271.]

MUNICIPAL CORPORATIONS—BREACH OF THE PEACE—FINE—VOID ORDINANCE.—A city ordinance fixing a less penalty for an offense than that fixed by statute for the same offense is void. Hence, if a city ordinance imposes a penalty of not less than ten nor more than one hundred dollars for a breach of the peace, while the minimum fine under the statute is one cent and maximum fine is one hundred dollars, in addition to which imprisonment not less than five nor more than fifty days may be inflicted, the ordinance is void.

CRIMINAL LAW—BREACH OF THE PEACE—VALIDITY OF JUDGMENT.—If a breach of the peace is made punishable, both by statute and by ordinance, and one is convicted for that offense before a police court having jurisdiction thereof, upon a complaint charging him with violating the ordinance, and a sentence authorized by the statute is imposed, the judgment is valid, though the ordinance is void.

MUNICIPAL CORPORATIONS—NONLIABILITY OF, FOR ACTS OF OFFICERS IN ENFORCING PENAL LAWS.—As municipalities represent the commonwealth, and municipal officers,

while engaged in duties relating to the public safety, and in the maintenance of public order, are the servants of the commonwealth, although their duties may be confined to the enforcement of the law within a specified territory, a city is not liable for the acts of its officers in enforcing the criminal or penal laws of the commonwealth, or in enforcing the penal ordinances of the city. It would not, therefore, be liable for the acts of its officers in enforcing a judgment of conviction for a breach of the peace, though such judgment were void.

John Feland & Son, for the appellant.

J. D. Atchison, for the appellee.

272 PAYNTER, J. The appellant instituted action against the city of Owensboro, seeking to recover damages for an alleged unlawful arrest, conviction, and confinement in the workhouse of the city.

It is alleged in the petition in substance that C. N. Pendleton is the judge of the police court of the city of Owensboro; that as such officer he issued a warrant against appellant, charging him with violating an ordinance of the city of Owensboro, denouncing a penalty for a breach of the peace; that by virtue of the warrant the city marshal arrested him and carried him before the police court where he was tried, convicted for a breach of the peace, and adjudged that the city of Owensboro recover of him one hundred dollars and costs, and failing to pay which he was confined in the workhouse of the city for some time.

It is also alleged that the proceedings were under an ordinance, **273** which reads as follows, to wit: "Any person or persons who shall, within the city of Owensboro, be guilty of a riot, rout, unlawful assembly, or breach of the peace, shall, upon conviction, be fined not less than ten dollars nor more than one hundred dollars."

It is insisted that the ordinance under which the prosecution took place is unconstitutional and void, and, therefore, appellant is entitled to recover damages of the city.

A demurrer was sustained to the petition, and, appellant failing to amend, his petition was dismissed.

Section 1268 of the Kentucky Statutes is as follows: "If any person or persons shall be guilty of a breach of the peace, . . . the person so offending, and each of them, shall be fined not less than one cent nor more than one hundred dollars, or imprisonment not less than five nor more than fifty days, or both so fined and imprisoned."

By the terms of the ordinance, the fine for a breach of the peace cannot be less than ten dollars nor more than one hundred

dollars and imprisonment is no part of the penalty. While, under the statute for a breach of the peace the minimum fine is one cent and maximum fine is one hundred dollars, and in addition to which imprisonment not less than five nor more than fifty days may be inflicted.

It will, therefore, be observed that the penalty for a breach of the peace under the ordinance is much less than the one denounced in the statute.

Section 168 of the constitution is as follows: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

The penalty for a breach of the peace under the ordinance ^{§74} being less than the one imposed by the statute, the ordinance is in violation of the constitution and void.

Under subsections 22 and 23 of section 3290 of the Kentucky Statutes, the common council of the cities of the third class have the power, within the limits of the constitution of this state and the act relating to cities of that class, to pass ordinances imposing fines and imprisonment for the violation of ordinances and by-laws, breaches of the peace, etc.

The ordinance imposing a fine for a breach of the peace being void, the status remained as if no action whatever had been taken by the common council. There was a statute in force under which both fine and imprisonment could be imposed for a breach of the peace in the city of Owensboro. The judge of the police court of that city had jurisdiction to try persons charged with that offense.

A warrant was issued charging the appellant with the offense of a breach of the peace, under which he was arrested, tried, and convicted. It is alleged in the petition he was required to answer "the charge of violating city ordinance 8, breach of the peace, in said city." We understand this to mean that appellant was charged with the offense of a breach of the peace. Although he was charged with violating the ordinance, yet the gravamen was a breach of the peace. The judge and the marshal may have proceeded to and did prosecute the appellant on the charge of a breach of the peace, believing the ordinance in question to be in force, and imposed the fine. Yet it was not in force, but a statute was which authorized the imposition of the fine for a breach of the peace. The jurisdiction of the court existed with

ample power to try and convict the accused on the charge of a breach of the peace, if proven guilty, and, although the judge may have labored under the erroneous impression that the ordinance was in force, yet having imposed such fine as ²⁷⁵ he had authority to do by statute, his judgment was not void, and appellant's imprisonment under it illegal. A judgment may be right, still the court may have given a very insufficient or erroneous reason for it. The warrant may have coupled with the charge of a breach of the peace the fact that it was in violation of a void ordinance, still the warrant would be valid, because, by statute, a penalty is denounced for the breach of the peace. While the warrant may have not been in exact form as to the charge and the law, still the court had jurisdiction of the matter. The appellant could have raised any objection he saw proper to the warrant. He was in court, pleaded not guilty, and proceeded in the trial, so far as the petition shows, without raising any question as to the form of the warrant or manner of stating the charge against him, and, as the court had jurisdiction to try the case, the only remedy which appellant had was by appeal from the judgment of conviction.

Had there been no statute imposing a fine, etc., for a breach of the peace, then the question as to the effect of such judgment would be a different question from the one presented in this case. However, that would not affect the question as to the liability of the city. Municipal governments are auxiliaries of the state government. They are created principally to aid in securing a proper government of the people within the boundaries of such municipalities, and to make more effectual the maintenance of public order. The judges of the police courts, as well as the marshals of municipalities, are officers of the commonwealth and their respective municipalities, although their duties might be confined to the enforcement of the law within a specified territory. The marshals of such cities are declared to be peace officers of the cities and commonwealth: Ky. Stats., sec. 3341.

²⁷⁶ A breach of the peace is a public offense. It is an offense against the commonwealth. The general assembly has so declared it to be. While the general assembly has conferred authority upon the common councils of cities of the third class to impose a penalty on those who may be guilty of it within certain limits, still the offense remains a public one and against the commonwealth.

The evident purpose of the constitutional convention and the

general assembly was to make more certain and effective the prosecution of the persons who might be guilty of such offenses by conferring upon those immediately affected by such violation of the law the authority to enforce the law and inflict punishments for its violation. But that proper penalties should be imposed under municipal ordinances, the constitution prohibits prescribing by an ordinance a less penalty than that fixed by the statute for the offense. That one charged with such offenses as were denounced by statute and by a municipal ordinance should be put in jeopardy but once, the constitution declared a conviction or acquittal under one should constitute a bar to another prosecution for the same offense.

A municipal corporation is not liable for the acts of its officers in enforcing the criminal or penal laws of the commonwealth, or in enforcing penal ordinances of the city. The maxim *respondeat superior* has no application.

It is said in 2 Dillon on Municipal Corporations, section 974: "It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation.

"If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which ²⁷⁷ they discharge their trusts; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies.

"But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable.

"It will be seen that, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of

an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation."

"Agreeably to the principles just mentioned, police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an assault or battery committed by its police officers, though done in an attempt to enforce an ordinance ²⁷⁸ of the city; nor for an arrest made by them which is illegal for want of a warrant, or for other cause; nor for their unlawful acts of violence, whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed. So, on the same principle, a person who suffers a personal injury while aiding the police officers of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city. The municipal corporation, in all these and the like cases, represents the state or the public; the police officers are not the servants of the corporation, and hence the principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability."

The principle enunciated by Mr. Dillon is sustained by almost an unbroken line of decisions of the courts of this country, and by this court in the cases of *Pollock v. Louisville*, 13 Bush, 221; 26 Am. Rep. 260; *Jolly v. Hawesville*, 89 Ky. 279; *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585.

The cases rest on the ground that municipalities represent the commonwealth, and municipal officers, while engaged in duties relating to the public safety, and in the maintenance of public order, are the servants of the commonwealth.

The judgment is affirmed.

MUNICIPAL CORPORATIONS—PUNISHMENT OF OFFENSE AGAINST BOTH CITY AND STATE—LIABILITY FOR ACTS OF OFFICERS.—Though an act is made criminal, and punishable by the laws of the state, a municipality may also make it punishable, and authorize proceedings for the imposition of such punishment: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; *Hunt v. Jacksonville*, 34 Fla. 504; 43 Am. St. Rep. 214; nor is the corporation limited or restricted to the same penalties imposed by the general law: See monographic note to *Robinson v. Mayor*, 34 Am. Dec. 642. A violation of a void municipal ordinance is not a criminal offense: *State v. Webber*, 107 N. C. 962; 22 Am. St. Rep. 920. A municipal corpora-

tion is not answerable for the unauthorized and unlawful acts of its officers: See monographic note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358, 360, on liability of city for unauthorized acts of its officers. No municipal liability, therefore, results from the attempted enforcement of a void ordinance: See monographic note to *Goddard v. Inhabitants of Harpswell*, 80 Am. St. Rep. 376, 405, on the liability of cities for the negligence and other misconduct of their officers and agents.

SOUTHERN BUILDING & LOAN ASSOCIATION v. NORMAN.

[98 KENTUCKY, 294.]

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS IS CONSTITUTIONAL.—A statute requiring every foreign building and loan association, doing business in the state, to pay into its treasury, annually, two dollars on every one hundred dollars of its annual gross receipts, does not violate either the state or federal constitution.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—FRANCHISE.—A state tax upon the gross receipts of a foreign building and loan association is a tax upon the franchise of the corporation, measured by the extent of its business, and not a tax upon its property. It is not, therefore, unconstitutional as violating a statute providing for taxation based on income, licenses, or franchises.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—TAX FOR DOING BUSINESS, EFFECT OF.—If a state tax upon a foreign building and loan association is found to be, in effect, a franchise tax, the corporation cannot complain that its property is otherwise taxed or is nontaxable.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—DOUBLE TAXATION.—A statute requiring every foreign building and loan association, doing business in the state, to pay into its treasury, annually, two dollars on every one hundred dollars of its annual gross receipts, does not impose double or unequal taxation, because, while the subscribers for paid-up stock pay on their shares, the company pays no annual tax thereon, but simply a tax for the privilege of doing business.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—IMPAIRING OBLIGATION OF CONTRACTS.—A state tax upon the annual gross receipts of a foreign building and loan association, not being a tax upon the property of the corporation, does not impair the obligation of contracts of subscription made before the law was passed.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—INTERSTATE COMMERCE.—A state tax upon the annual gross receipts of a foreign building and loan association, and which in express terms affects only business done within the state, is not an interference with the freedom of commerce between the states.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—EQUAL PROTECTION OF LAWS.—If a statute taxing the annual gross receipts of a foreign building and loan association imposes substantially the same burden upon other like corporations, similarly situated, it does not deny to any the equal protection of the laws.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—ENTRY OF CORPORATION BEFORE PASSAGE OF STATE LAW.—The fact that a foreign building and loan association enters a state before the enactment of any law therein to tax its privileges, does not preclude the state from afterward imposing a reasonable tax on the right of the corporation to transact business, and rating it according to the amount of business done after the enactment of the law.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—EQUAL PROTECTION OF LAWS—FEE FOR LICENSE.—The imposition of a charge of twenty-five dollars on the agent of a foreign building and loan association, fixed on all alike, does not affect the right of the state to tax the annual gross receipts of the corporation, as it is in the nature of a fee for the license, not exceeding the cost of its issuance, and the regulations respecting it.

TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—METHOD.—As between a domestic corporation and a foreign building and loan association, the state may adopt different plans of taxation without necessarily discriminating against either.

Knott & Edelen and W. G. Bullitt, for the appellant.

Wm. J. Hendrick, attorney general, for the appellee.

²⁰⁷ **HAZELRIGG, J.** This appeal involves the constitutionality of the statute requiring every foreign building and loan association doing business in the state to pay into the treasury annually two dollars on every one hundred dollars of its annual gross receipts: Ky. Stats., sec. 4228.

The law is assailed as being: 1. In violation of section 174 of the state constitution; 2. As impairing the obligation of contracts in existence when the law became operative; 3. As an unwarrantable interference with the freedom of commerce between the states; and 4. As denying to the association the equal protection of the laws.

It is apparent that a brief inquiry into the nature of the business done by the association is pertinent to a proper understanding of each of these contentions, and especially in so far as the business is supposed to be affected with an interstate character. We say brief inquiry because the general characteristics of these associations are alike, and in recent years have become well known.

The appellant's principal office is at Knoxville, Tennessee. Its course of business is this: Each subscribing member contracts to contribute each month a stated sum, which the company agrees to invest on bond and mortgage, collecting the interest monthly and reinvesting at frequent intervals the entire moneys received from all sources for the benefit of the stockholders, share and

share alike. These contributions ²⁹⁸ are made at the rate of sixty cents per month on each share of stock subscribed for until the time when such installments and their accumulations shall amount to the sum of one hundred dollars for each share. This period is approximately seven years.

Prior to the 11th of November, 1892, when the law in question became operative, none of the stock had matured, though the appellant had been doing business in the state and had made numerous contracts. From the date named until June 1, 1893, the gross receipts of the association were ninety-three thousand and fifty-seven dollars and sixty cents, but how much of this was old and how much was new business does not appear.

1. Is the statute in conflict with section 174 of the state constitution? The section reads as follows: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises."

In this connection it is pertinent to read a portion of section 181 of the same instrument: "The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax."

It is said that the imposition of the levy of two per cent on the gross receipts of the association is not in the nature of a license tax, because, as those terms imply, such a tax is enforced to obtain a license to do business in the future, and cannot, in the nature of things, be an exaction on past business. A license, it is said, is a permission, and the payment of ²⁹⁹ a license tax proper is required as a condition precedent to doing a business otherwise prohibited. It is not an income tax, because the company has no property out of which an income may arise, and it is not a franchise tax, it is said, because the state has granted no franchise, that being a grant of another sovereignty.

The conclusion is reached, therefore, that the statute imposes a tax on the business of the association. As this business in this state consists solely in selling shares of stock to Kentucky members, it is manifest the company can have no gross receipts except from payments made by its Kentucky subscribers. These subscribers, under section 4093 of the Kentucky Statutes, are requir-

ed to pay taxes on their shares of building and loan association stock as on other individual personal property. Therefore, say counsel, undisguised double taxation, and hence taxation not in proportion to its value, is imposed, not as sometimes unavoidably happens on the same property in the hands of different owners, but double taxation of the same property in the hands of the same owners, because the association is a purely mutual one, and the assets belong exclusively to the shareholders.

The fallacy of the argument, it seems to us, lies in the assumption that this statute imposes a tax on property at all. Certainly it is not an *ad valorem* tax. The associations of the kind described generally have no tangible property within the state, and we do not regard the purpose of the statute to be to force an artificial situs on the obligations due the association from its members for stock, dues, etc. Indeed those contracts cannot be said to have any certain value. The members owe the contracts of subscription, it is true, but, upon notice, they may retire from membership and withdraw the value of their payments, subject to conditions not necessary to notice. The business, nevertheless, is a valuable ³⁰⁰ one, and it is for the privilege of doing this business that the tax is imposed. It is not a tax on the corporate franchise, for the conclusive reason that the state does not grant this, but it is a tax on the franchise of doing business in this state, and in this sense a franchise tax. It is true the amount of the gross receipts of the company is taken as the measurement of the tax, but this is only the adoption of a fair and just standard. Such taxes may be measured by dividends, by the amount of the capital stock, by the extent of the business transacted, by the net earnings, by the gross receipts, etc.

In the earlier cases a tax upon the gross receipts of a railroad company was held not to be a direct tax on the property, but a tax upon the franchise of the corporation, measured by the extent of its business: *State Tax on Railway Gross Receipts*, 15 Wall. 284. But subsequently the same court, in *Fargo v. Michigan*, 121 U. S. 230, and *Philadelphia etc. Co. v. Pennsylvania*, 122 U. S. 326, modified or rather denied the right of the state to thus tax an interstate agency under such a guise.

With this feature of the taxing power, however, we have nothing to do here. To the extent that such a claim is urged by counsel we shall notice presently. Regarded as a tax for doing business in the state, we see at once that the plea of want of uniformity and failure to tax in proportion to value becomes unavailing. So, also, the contention that there is double taxation. If

the tax is found to be in effect a franchise tax, the complaint cannot be made that the property of the corporation is otherwise taxed or is nontaxable: *Society for Savings v. Coite*, 6 Wall. 594; *People v. Home Ins. Co.*, 92 N. Y. 328.

In our opinion, however, there is, in fact, no unequal or double taxation imposed. So far as borrowing members are ³⁰¹ concerned they do not list their shares for taxation, and, while the subscribers for paid-up stock pay on their shares as on other individual property, the company pays no annual tax on these shares. After paying on its gross receipts for any given year, it never again pays on the receipts of that year. It never receives them again. The one payment exhausts the force of the statute for all time.

2. Counsel say that, viewed from the standpoint of the company, the subscriptions may be regarded as choses in action, and, having no situs in this state except the artificial one created by this statute, the contracts of subscription, made before the law was passed, are impaired to the extent of the tax imposed.

In *De Vignier v. New Orleans*, 16 Fed. Rep. 11 (the case relied on by counsel), it was held that, "in the absence of any provisions of the statute which had entered into and formed part of the contract, giving the right to impose a tax, bonds, or other obligations of a city which belong to nonresidents, cannot be taxed without impairing the force of the obligation itself."

But we have seen that there is no purpose here to tax the property of the corporation or impart to its property a forced location contrary to the settled rules which govern that class of property. The principle announced in the case is not applicable.

3. 4. Finally it is said that the freedom of commerce between the states is interfered with, and the equal protection of the laws denied the corporation.

The statute, whatever may be said of the nature of the tax it imposes, in express terms affects only business done within the state. The business traffic or commerce, if you please so to term it, of the corporation is purely internal or domestic.

³⁰² Having under consideration the validity of a tax imposed on a Nebraska Express Company by a Missouri statute similar to the one now in question, the supreme court, by Justice Lamar, after quoting the statute, said: "It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sum earned and charged for the business done within the

state. This positive and oft-repeated limitation to business within the state, that is, business begun and ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within the state' cannot be made to mean business done between that state and other states": *Pacific Exp. Co. v. Seibert*, 142 U. S. 339.

This case is decisive also of other contentions made by the appellants here. The tax under consideration was one on the gross receipts of a foreign corporation, and it was contended that the act violated "the requirements of uniformity and equality of taxation prescribed by the constitution of Missouri, and thereby denied to the complainants the equal protection of the laws of the state, which the fourteenth amendment to the constitution guarantees shall not be abridged by state action."

The court said that it had repeatedly "laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property, selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms": Citing *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, ³⁰³ 237; *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 607.

The perfect application of these principles to the case at hand becomes apparent when we observe the substantially perfect identity between our statute and the Missouri statute. For not only was the complainant a foreign corporation, and the tax one on its gross receipts on business done in the state, but the rate was two dollars on the one hundred dollars of such receipts taken in for one year next preceding a time certain fixed in the statute.

The court further proceeds to demonstrate that the manner of taxing the express company, which had no tangible property in the state of consequence, was necessarily different from that of other corporations, but there was no unjust discrimination on that account.

We may observe here that the burdens imposed on appellant by the statute under consideration are substantially the same as those imposed on other similar corporations similarly situated.

In the case of *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, relied on by the appellant, the plaintiff in error was a fire insurance company of Pennsylvania, doing business in the state of New York, and the question was, what effect the fourteenth

amendment of the constitution should be given in the matter of taxing the foreign corporation. The court first decided that "issuing a policy of insurance is not a transaction of commerce."

The case of *Paul v. Virginia*, 8 Wall. 168, was also distinctly approved, wherein it was said: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states ³⁰⁴ may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with the citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." And a tax of three per cent on the premiums received by the complaining company in the state of New York for a given year was upheld, because a like tax had been imposed on New York insurance companies doing business in Pennsylvania. The court also approved its former decision in *Ducat v. Chicago*, 10 Wall. 410, where it was said "that the power of a state to discriminate between her own corporations and those of other states desirous of transacting business within her jurisdiction being clearly established, it belonged to the state to determine as to the nature or degree of discrimination, 'subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.'"

The right to impose the tax in the case at hand does not depend, it seems to us, on its being paid as a condition precedent to the entrance of the corporation into the state. If the corporation, by the diligence of its agents, entered the state before any law was enacted to exclude it, or tax its privileges, it still cannot be said that the state assented to such entrance or gave it any official recognition, whereby it was precluded from imposing a reasonable tax on its right to transact business, and rating it according to the amount of business done after the enactment of the law.

It was at last a tax on the privilege of doing business after the enactment of the law, and its collection postponed in order that the sum of it might be fixed with regard to the amount of business done. It might have been fixed without regard to such amount.

³⁰⁵ We do not think that the imposition of the charge of twenty-five dollars on the agent of the corporation, fixed on all

alike, affects the right to impose the tax in question. This was in the nature of a fee for the license, not exceeding the cost of its issual and the regulations with respect thereto.

It may be observed finally that while the language of some of the cases cited and others not referred to sustain the position that the state may favor its own corporations or impose a less tax on them than on foreign ones, the assertion of that principle is not necessary here to sustain the statute in question. It does not follow, because different plans of taxation are adopted with respect to the two classes, that there is a discrimination against either. It is practically impossible to compare a tax rate, fixed on property on the ad valorem system, with a rate fixed without reference to the value of property, but as a tax on the privilege of doing business. But an examination of our various statutes will, we think, show no discrimination against the nonresident corporation.

The judgment dismissing the petition is affirmed.

TAXATION OF FOREIGN CORPORATIONS.—The franchise of a corporation is of itself property, and, as such is liable to taxation, according to its value, for the support of government, whether paid for by a bonus or not: *Mayor v. Baltimore etc. R. R. Co.*, 6 Gill, 288; 48 Am. Dec. 531. A burden or bonus imposed by charters upon the corporation, or by the acts of assembly renewing the charters, is not a tax, but a price or condition arbitrarily or discretionally fixed by the legislature as the consideration of its grant: *Mayor v. Baltimore etc. R. R. Co.*, 6 Gill, 288; 48 Am. Dec. 531. A state may impose upon corporations of other states a tax for the privilege of carrying on their business within it, although no equivalent burden is imposed upon its domestic corporations: *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522; monographic note to *People v. Naglee*, 52 Am. Dec. 834, on power of the state to exact licenses, and to charge therefor; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 331, and monographic note thereto on discrimination in the taxation of foreign corporations. A state may constitutionally tax a foreign corporation having an office or place of business within it: *Attorney General v. Bay State Min. Co.*, 99 Mass. 148; 96 Am. Dec. 717. The privilege of carrying on its business within a foreign state is taxable by that state: See monographic note to *New Albany v. Meekin*, 56 Am. Dec. 523, 531, on place where property may be taxed. But a state cannot tax a foreign corporation upon a different principle, or in a different manner from what she can tax one of her own domestic corporations: *Erie Ry. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226. A corporation, however, doing business in a foreign state thereby subjects itself to the statutes of that state: *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423; 42 Am. St. Rep. 418; and a state may, in its discretion, require a foreign corporation to comply with certain prescribed formalities, to pay taxes, licenses, etc., and to assume obligations that may be required of it, as a condition precedent to its right to transact business within its jurisdiction: See monographic note to *Ducat v. Chicago*, 95 Am. Dec. 536, 537, on power of the state to discriminate against foreign corporations doing business therein. When the state permits a foreign corporation to transact business

within its limits in its corporate name, and imposes taxes on it for the privilege, this is not a regulation of interstate commerce, but a lawful exercise of the power of taxation upon a corporation that, for the time being, is within its jurisdiction for that purpose: *People v. Wemple*, 181 N. Y. 64; 27 Am. St. Rep. 542. A license tax imposed on corporations for exercising their franchises is not a property tax: *Standard etc. Cable Co. v. Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394; note to *Attorney General v. Bay State Min. Co.*, 98 Am. Dec. 720; though the amount of the capital stock, or the extent of the business transacted, may properly afford the means of computing the amount of the tax: Note to *Attorney General v. Bay State Min. Co.*, 98 Am. Dec. 720; and such a tax cannot conflict with constitutional provisions requiring equality in the taxation of property: *Standard etc. Cable Co. v. Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394. No exemption of a particular corporation from taxation can be implied from the mere fact of the payment of a bonus by it for its franchise: *New Orleans v. New Orleans R. R. Co.*, 42 La. Ann. 4; 21 Am. St. Rep. 365. Taxation of shares of corporate stock is not a tax on the capital stock of the corporation, as they represent different property interests, are distinct subjects of taxation, and the taxation of both is not double taxation *Commonwealth v. Charlottesville etc. Co.*, 90 Va. 790; 44 Am. St. Rep. 950. The general law of building and loan associations is the subject of a monographic note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 150-166.

GREEN v. TAYLOR.

[98 KENTUCKY, 330.]

PARTNERSHIP—WHO ARE PARTNERS—HOLDING OUT. Those who hold themselves out as partners, and buy as such, must be so considered, in an action by creditors.

PARTNERSHIP—PARTNER CANNOT HOLD FIRM PROPERTY AS EXEMPT.—A partner cannot claim and hold firm property as exempt from attachment or execution.

Will C. Curd, for the appellants.

O. H. Waddle, for the appellees.

330 GUFFY, J. This action was instituted in the Pulaski circuit court by Green, Huffaker & Co. against E. R. Taylor & Son to recover judgment on a claim of two hundred and eighty-six dollars and thirty-five cents; and plaintiffs also sued out an attachment against the property of the defendants, 331 which attachment was levied on a lot of merchandise as the property of the defendants. The appellant, E. T. Thistler, about the same time brought suit in the police court of Burnside, in said county, against the defendants, and also procured a levy of an attachment on the same property, which suit was transferred, as provided by law, to the Pulaski circuit court, and consolidated with the suit of Green, Huffaker & Co. against defendants. An order of sale

was obtained and the attachment property was sold and proceeds held subject to the final order of the court. The defendant, E. R. Taylor, answered and substantially alleged that he alone constituted the firm of E. R. Taylor & Son, and was the individual owner of the goods levied on; that his son, R. L. Taylor, was a boy under twenty-one years old, and was clerking for him, and by this means only was identified with him in the business. He also controverted the grounds of the attachment, and averred that he was a bona fide housekeeper with a family, and that he had no provisions on hand to sustain his family for one year or any length of time, and that the goods levied upon were the only personal property that he owned out of which he could receive property in lieu of said provisions not on hand, and prayed that the attachment be dismissed, and that he be allowed the money realized from the sale of the attached property. Plaintiffs, in their reply, averred in substance that at the time defendants purchased the goods mentioned in their accounts the defendants represented to them, plaintiffs, that they were doing business as merchants and partners under the firm name of E. R. Taylor & Son, and, believing said representations to be true, and not knowing that R. L. Taylor was under twenty-one years of age, did, upon the faith of said representation, believing that they were partners, give them credit and sell them the goods, the price for ³³² which is now sued for; that said defendants held themselves out to the world as partners, and that if they, plaintiffs, had known defendants were not partners they would not have sold the goods, and pleaded the said representations as an estoppel; also traversed all the material averments of the answer, and deny that any exemptions can be legally allowed defendant out of the proceeds of the said property. Appellants further charge that defendant retained in his hands and converted to his use and that of his family notes and accounts more than sufficient to cover the amount allowed a housekeeper with a family.

The material averments in the reply were denied by the defendant in his rejoinder. The court, upon final hearing, rendered judgment in favor of the plaintiffs against E. R. Taylor & Son for the amount of their claims sued on, the same not being controverted, and sustained the attachments, but also adjudged that defendant, E. R. Taylor, was entitled to the money realized from the sale of the attached property in lieu of provision for himself and family. The defendants excepted to the judgment sustaining the attachment, and plaintiffs excepted to the judgment adjudging the fund aforesaid to E. R. Taylor, and to reverse

same the plaintiffs prosecute this appeal, and appellees have taken a cross-appeal from the judgment sustaining the attachment.

We have carefully read the evidence in support of the attachment, and we think that it sustains the judgment as to the attachment, and the same is affirmed.

Appellants insist that the court erred in adjudging the proceeds of the sale of the attached property to E. R. Taylor. Appellees' contention is, that E. R. Taylor was entitled to hold the goods levied on, under the statute allowing certain exemptions in lieu of provisions not on hand, and that, the property having been sold, appellee was entitled to the ²³³ money realized by the sale. It is also claimed that the son, R. L. Taylor, was under twenty-one years of age, and, in fact, only a clerk in the store, and, in fact, had no interest in the goods, and that the firm name was only used as a matter of convenience. The proof, however, is conclusive that the appellees held themselves out to the world as partners and purchased the goods, the price of which is sued for, from these plaintiffs as partners, and also brought suits in the firm name of E. R. Taylor & Son for debts due them as such; hence they must be held and considered as a firm, so far as this action is concerned, whether or not they were in fact partners. There was some claim that appellees had about six hundred dollars in notes and accounts, but that claim is not well proven, so the only question to be decided is, whether or not one member of a firm can claim and hold partnership property under and by virtue of the exemption laws.

It is true that there is considerable conflict of authority on this subject, but, so far as we are advised, this question has never been decided by this court.

Mr. Thompson, in his work on Homesteads and Exemptions, discusses the question at some length, and refers to numerous decisions, some allowing the exemption and others disallowing the same, and, in conclusion, says in substance that the preponderance of authority is against allowing such claim of exemption: See Thompson on Homesteads and Exemptions, sec. 216.

This question is also discussed at length in Freeman on Executions, and, in conclusion, it is said: "But the tendency of the recent decisions to deny altogether the right of exemption out of partnership property, or out of partnership assets, is unquestionable, and, we think, irresistible": 1 Freeman on Executions, sec. 221.

The exemptions given by the Kentucky statutes manifestly refer to and mean property owned by the individual ²³⁴ debtor.

In case of a partnership, neither member has title to firm property, but the title is in the firm. It seems to us that our statutes, the weight of authority, and public policy all require the rule to be that partnership property cannot be claimed and held by any member of the firm as exempt from execution. It results, therefore, that the court below erred in directing the receiver to pay over to E. R. Taylor the money realized from the sale of the attached property. That judgment is, therefore, reversed, and cause remanded, with directions to set aside that judgment and to adjudge that the said money be paid to the plaintiffs on their debts pro rata, or according to priority of liens, if there be any priority, and for proceedings consistent with this opinion..

Affirmed on cross-appeal. Reversed on original appeal.

PARTNERSHIP—LIABILITY OF PERSON HELD OUT AS PARTNER.—One, although not in fact a partner, becomes liable as such to third persons, when he holds himself out, or allows himself to be held out, to the public as a partner: Note to *Fletcher v. Pullen*, 14 Am. St. Rep. 361; monographic note to *Hahlo v. Mayer*, 22 Am. St. Rep. 757, on the liability of one held out as a partner.

PARTNERSHIP—EXEMPTION—RIGHT OF PARTNER TO.—Partners cannot, during the existence of the partnership, claim an individual exemption in partnership property taken under legal process for partnership debts: Note to *Dennis v. Kasa*, 48 Am. St. Rep. 884.

GOLDNAMES v. O'BRIEN.

[98 KENTUCKY, 500.]

ASSAULT—CONSENT TO ATTEMPTED ABORTION—DAMAGES.—A person cannot maintain a civil suit to recover damages for an assault to which he consented. Hence, if two men are sued by a woman for damages for inducing her to submit to an attempted abortion on her person by a physician, and her pregnancy is not attributable to either of the defendants, she is not entitled to recover where she voluntarily left her home in one city and went to another place at which to have the operation performed, although the defendants procured the physician, and the jury should be so instructed.

W. H. Marriott and James C. Poston, for the appellants.

Haynes, Irwin & Kendall, for the appellee.

⁵⁰⁰ **HAZELRIGG, J.** The appellants were sued by the appellee, Sallie O'Brien, for inducing her to submit to an attempted abortion on her ⁵⁷⁰ person by a physician procured by them, and judgment was rendered for seventeen hundred dollars.

If we assume from the proof that the appellants did in any way induce the appellee to resort to this method of hiding her

shame, and they deny this most earnestly, it is clear from the testimony that she left her home in Elizabethtown and went to Louisville in search of this relief voluntarily, and alike voluntarily submitted herself to the treatment of a physician.

Her pregnancy was not attributable to either of the appellants and, at most, they may have urged the Louisville trip as the only means of securing the desired result, and may have furnished money and otherwise assisted the plaintiff in the accomplishment of her purpose. While it is not directly shown that either of them employed or otherwise procured the physician, and such a conclusion is based on the barest inference, yet this question is properly submitted to the jury, and we shall assume such a state of fact.

Waiving other questions, the important one in this appeal is, Can the plaintiff maintain this action? Or rather, as the petition avers an abduction and an attempted abortion against the plaintiff's will and consent, the question is, Is she entitled to a judgment upon the state of fact thus assumed to exist, and apparently found to exist by the jury? The right to recover is, of course, clear, unless it is destroyed by the complainant's consent to the assault, and whether this affects the right is a question of much conflicting authority.

It may be stated generally that the suit of a wrongdoer will be rejected when seeking redress for another's having participated with him in the wrong. Thus a woman who immorally yields to her seducer cannot sue because she consented to and participated in the wrong whereof she ⁵⁷¹ complains: Bishop on Non-contract Law, sec. 57; Cline v. Templeton, 78 Ky. 550. The author last quoted further says (section 196) that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape nor even assault," and that "the execution of any unlawful contract places it past annulment, and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves; since neither can complain of that to which he consented." And the learned author, after citing a number of American and English cases to sustain the text, adds: "Such is the distinct and inevitable deduction of the reasoning of the law; applicable, however, in all its consequences, only where the beating was not in excess of the consent. But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy, and so have held that one may maintain his

civil suit for a battery to which he consented and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judges, should not be followed in future cases."

To the same effect Mr. Roscoe says (1 Roscoe on Criminal Evidence, 306: "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position."

The author cites numerous authorities supporting the text, but points out that not every act of submission implies consent. Thus, from the mere submission of a child or ⁵⁷² person of weak mind, consent is not necessarily to be presumed. In the case at bar, however, it would be too much to say that the act of the complainant was not willingly and intentionally done.

In 1 Wait's Actions and Defenses, section 11, page 344, it is said: "An assault implies force upon one side, and repulsion, or, at least, want of assent, on the other. An assault upon a consenting party would, therefore, be a legal absurdity."

On the other hand, Mr. Cooley, in his work on Torts, page 163, says: "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. . . . But in a case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. . . . The rule of law is, therefore, clear and unquestionable that consent to an assault is no justification." And one wounded in a duel is said by the learned author to have a cause of action for damages against his adversary, for a consent which the law forbids cannot be accepted as a legal protection. Some of the cases cited by the author, however, are criminal prosecutions, but others support the text.

These authorities seem to be irreconcilable. While we readily appreciate the argument that, so far as the state is concerned, no consent can be pleaded in justification, we have not been able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be ⁵⁷³ closed and the complaint of the other

heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other as wrongfully consented to be beaten.

In a late work on this subject it is said: "Harm suffered by consent is not, in general, the basis of a civil action. . . . If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it": 1 Jaggard on Torts, 199.

In *Duncan v. Commonwealth* (1838), 6 Dana, 295, the defendant, to an indictment for an affray, pleaded a former conviction under an indictment for an assault and battery, and this court said: "As an affray is a disturbance of the public peace by a fighting with the mutual consent of the combatants, it would be intrinsically improbable that a conviction for an assault and battery—which would not be authorized unless there had been a trespass without the consent of the person injured—had been adjudged as a punishment for an act which should be deemed an affray."

And while in that case and the quotation from Roscoe as well the law in criminal cases was being considered, and the rule as laid down is not now followed, the authority strongly tends to support the principle that at least the party consenting to the injury cannot profit by his wrongful act.

The instruction, therefore, asked by the appellants that, if the plaintiff voluntarily went to Louisville for the purpose of having the alleged abortion performed on her, the law was for the defendants, should have been given.

Judgment reversed for proceedings consistent with this opinion.

ASSAULT—CONSENT—CIVIL ACTION FOR DAMAGES.—If two men fight in anger by consent, each is liable to the other for actual damages: *Shay v. Thompson*, 59 Wis. 540; 48 Am. Rep. 538. Fighting, being an unlawful act, the consent is void: *Stout v. Wren*, 1 Hawks, 420; 9 Am. Dec. 653, and note. If, in the prosecution of an unlawful act, one intentionally hurts another, although by his consent, he is liable: Note to *Peterson v. Haffner*, 26 Am. Rep. 84.

ALLEY v. HOPKINS.

[98 KENTUCKY, 668.]

SURETYSHIP—MERE INDULGENCE DOES NOT DISCHARGE SURETY.—Mere passive indulgence by the payee of a note to the maker does not release the surety, although interest is paid, at a specified rate, according to agreement, at the end of each year, as the payee's acceptance of interest for a preceding year does not imply an agreement that he will not sue for another year, and does not, therefore, deprive the surety of his right to require the creditor to sue at any time, or to pay the debt himself, and be subrogated to the rights of the creditor.

Brown & Brown, for the appellant.

John F. Hager, for the appellees.

668 HAZELRIGG, J. Several years prior to 1886 John Alley loaned to the firm of Hogan & Son one thousand dollars, and upon the back of the firm's note for that sum the names of Hopkins and the other appellees appeared as accommodation indorsers.

On June 11th of the year named, the form of the paper was changed, and, under the firm's name, the appellees wrote 669 their names as sureties. This note was due in twelve months, and contained no provision as to interest. On it were the indorsements, "Interest paid up to June 11, 1888," and "Interest paid up to June 11, 1889."

In November, 1889, suit was brought against the principals and judgment obtained, but it appears they had become insolvent, and, in October, 1890, this action was instituted against the sureties.

They pleaded that, for a valuable consideration, the payee had extended indulgence to the principals for a definite period and forbore to sue on the original contract; and whether or not this is true is the only question presented on this appeal. The contention of the sureties is, that the testimony shows that, upon the maturity of the note, on June 11, 1887, Hogan & Son paid Alley one hundred dollars, a like sum on June 11, 1888, and a like sum on June 11, 1889; that, upon the payment of each of these sums, Alley agreed that the firm should keep the money for another year—the consideration for the extension of credit being the payment of usurious interest, or forty dollars each year in excess of legal interest; that this was a novation and effected their discharge, or, at any rate, here was an agreement in consideration of interest to be paid by which a definite time was fixed within which the payee had lost his right to resort to his legal remedy.

It is conceded that no interest was paid in advance. The principal agreed, when he borrowed the money, to pay ten per centum interest per annum, and, at the maturity of the note, in June, 1887, he paid the exact sum he agreed to pay and no more. So far, therefore, the surety is not affected. If, however, in addition to complying with its promise to pay this interest, the firm secured a valid and enforceable contract to keep the money another year—a contract which ⁶⁷⁰ would prevent Alley from suing for his money, or the firm from paying it if it so desired—then the original attitude of the parties has been changed and the sureties are released.

The proof on the particular point involved is within a small compass, though not altogether free from confusion. Alley is positive that the only agreement ever made was that the Hogans were to pay him ten per cent and that this was paid for three successive years—each year as interest for the preceding year—and that he made no arrangement or agreement for any succeeding year, except to say that, if he did not need the money, the firm might keep it by paying the ten per cent interest.

Hogan, Sr., upon whose testimony the sureties rely, proves that he agreed to pay and did pay ten per cent at the end of each year, as interest for the preceding year, and it was then agreed that the firm might keep the money for another year at the same interest. On cross-examination, he states that there was no consideration given by him, directly or indirectly, that Alley should not collect his money whenever he pleased. The testimony of Hogan, Jr., the only other witness, is too indefinite to be of any value.

It is manifest that the payment of the one hundred dollars did not, to any extent, form the basis of the agreement to let the Hogans keep the money for a succeeding year. The agreement to extend the credit for a year was solely because of the promise of the Hogans to again pay a like sum at the end of the extended period. They paid this interest solely because they agreed to do it. It was their contract. So far, therefore, as the various payments of interest are concerned, the rights of the sureties are not affected, and the simple question remains, Was there an agreement to extend the ⁶⁷¹ time of payment for a definite time in the future, in consideration of a promise to pay interest at the rate stated?

It is clear, however, that the rate agreed on is immaterial. So far as it was beyond the legal rate, it was usurious, and the contract was not enforceable save to the extent of the legal rate. But while the note, after the first year, bore six per cent, and an agree-

ment that that rate should be paid was no more than the law said should be paid, yet a promise to extend the time definitely, in consideration of an agreement to pay the legal rate, would be based on a valuable consideration, because, as said in *McComb v. Kitridge*, 14 Ohio, 351, cited and approved in *Robinson v. Miller*, 2 Bush, 187, "the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of time as there was for the original loan."

A careful examination of Hogan's testimony convinces us that the arrangement he had was a general one, commencing in 1883, when he first borrowed the money, that he was to pay ten per cent interest at the end of each year, and was to keep the principal sum at that rate so long as he wanted it or the payee did not choose to demand it. While the witness, in his examination in chief, speaks with some positiveness of his agreement to keep the money another year, on his cross-examination he qualifies his statements by saying in one instance, "The only agreement we had, I was to pay him ten per cent for his money," and, from his language quoted heretofore, it is manifest that there was no agreement by which the payee might not collect his money "whenever he pleased to do so."

From the testimony as a whole, we are impressed with the belief that great surprise would have been expressed by all ⁶⁷² the parties if, upon the tender of the money by the Hogans, Alley had refused to accept it by reason of any agreement that the payors were to keep it for any definite period in the future, or if Alley had demanded this principal, and the Hogans had asserted the right to keep it for any specified time. The alleged arrangement or agreement is entirely too indefinite to support the belief that we have here a case of a legal novation. We cannot believe that the proof authorizes the conclusion that, by any new contract, the sureties were denied any of their rights, or were at all obstructed in any of their remedies, legal or equitable. They could have paid the debt at any moment and have been subrogated to the rights of the creditor, or they could have required the creditor to sue, notwithstanding the indefinite arrangement existing between the principal and his debtor.

In reaching these conclusions, we have not overlooked the circumstances surrounding the parties to be affected. Alley was an old man—over seventy-three—and apparently unlettered. He was simply willing to let the earnings of his farm and log business stay out at ten per cent as long as his security was good.

To construe his passive indulgence into an agreement binding him not to collect his money would be a perversion of the proof as affected by the surroundings.

The debtors were quite willing to keep the money as long as they were not required to pay it, but never thought to defeat recovery at any time by the plea of an agreement to extend the credit for any definite time. At least, they did not do so when sued, in November, 1889, as they might have done had such an agreement existed. The sureties were residents of the same town, and, it is fair to presume, knew the debt had not been paid. Their remedies were, in fact, unobstructed, and, if they did not choose to urge the collection ⁶⁷³ of the debt they, and not Alley, must bear the resulting loss.

Judgment reversed for proceedings consistent with this opinion.

SURETYSHIP — MERE INDULGENCE DOES NOT DISCHARGE SURETY.—Mere negligence or passive inactivity in calling a principal to account does not necessarily discharge a surety. A creditor does not lose his right to hold the surety by inaction or passiveness, until the surety has complied with the statutory provisions as to notifying the creditor to proceed against the surety: See monographic note to Scott v. Fisher, 28 Am. St. Rep. 692, on what will release or discharge a surety. A new agreement to give further time to pay a debt, or to make good a default, if not supported by any new consideration, does not discharge a surety on the original contract: Note to Benson v. Phipps, 47 Am. St. Rep. 131. Unless there is an agreement binding upon the creditor to give time to the principal debtor, the surety is not discharged by mere indulgence: Note to Campbell v. Sherman, 81 Am. St. Rep. 737.

LOUISVILLE & NASHVILLE R. R. Co. v. McELWAIN.

[98 KENTUCKY, 700.]

NEGLIGENCE—DAMAGES—RECOVERY IN STATUTORY ACTION FOR CAUSING DEATH BARS COMMON-LAW RIGHT OF ACTION.—If a wife is killed by the negligence of a railroad company, a recovery by the husband, as personal representative, of damages, under a statute allowing a right of action for a personal injury to survive to the personal representative, is a bar to his common-law right of action, as a husband, to recover damages for the loss of his wife's society from the time of the injury until her death.

Ben T. Perkins, Jr., for the appellant.

Forgy & Petrie, for the appellee.

⁷⁰⁰ PAYNTER, J. On the eighth day of October, 1892, a freight train on appellant's road struck Josephine E. McElwain while she was crossing the track at a public road crossing, inflicting injuries from which she died on the twenty-third day of December, 1892. T. W. McElwain, the plaintiff in this case, qualified as executor of her will, instituted an action as such personal representative and recovered a judgment against the defendant for the sum of five thousand dollars. This action was instituted at the same time by the plaintiff, as the husband of the deceased, seeking to recover in his individual capacity ⁷⁰¹ damages for the "loss of her society" from the date the injury was inflicted until her death.

In the action as personal representative, he recovered compensatory damages, under the instructions of the court, for physical and mental suffering, for expenses of treatment, and for the permanent impairment of her ability to earn money, etc.

The sole question in this case is as to whether the recovery in the action as personal representative of the estate of the deceased is a bar to the husband's right to recover for a loss for which it is claimed the common law afforded him redress.

To determine this question the common law must be considered in connection with the statutory remedy afforded for the negligent acts resulting in death.

By the principle of the common law, the right of action for an injury to the person abates upon the death of the party injured, the case falling within the familiar rule, *actio personalis moritur cum persona*. Therefore, if death resulted, whether instantaneously or not, from such injury, no action could be maintained by the personal representative of the injured party to recover damages suffered by the decedent.

As early as 1606 in the king's bench, the case of *Higgins v. Butcher*, Yelv. 89, arose, wherein the plaintiff sought to recover damages of the defendant for assaulting and beating his wife, of which she died. The action seemed to have been for damages to the wife and not for the loss of service. It was held there could be no recovery, as the injury, having resulted in death, the cause of action therefor was merged in the felony. It might be added at this point that reasons other than merger have been suggested for the rule, to wit, the law of forfeiture, the maxim, *actio personalis moritur cum persona*, and public policy.

⁷⁰² From the case of *Higgins v. Butcher*, Yelv. 89, the question does not appear to have been raised in England until 1808,

in *Baker v. Bolton*, 1 Camp. 493. That was an action against the proprietors of a stage coach on which the plaintiff and his wife were traveling, when it was overturned, inflicting injuries on himself and also upon his wife, from which she died within a month. It was declared that "the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." Lord Ellenborough said: "The jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution."

The above is the opinion in full. Although the case was at nisi prius it is the leading case on the subject. It was recognized as the law in England until the enactment of the statute familiarly known as "Lord Campbell's Act," in 1846. Until the passage of that act the law was recognized to be that, "in a civil court, the death of a human being could not be complained of as an injury."

Formed after "Lord Campbell's Act," nearly, if not all, the states of the Union have enacted statutes making an action at law maintainable against a person who, by wrongful act, neglect, or default, may have caused the death of another.

The courts of this country, with one or two exceptions, accepted *Baker v. Bolton*, 1 Camp. 439, as authority, until the enactment of the statutes to which we have just referred.

Carey v. Berkshire R. R. Co., 1 Cush. 475, 48 Am. Dec. 616, follows *Baker v. Bolton*, 1 Camp. 439, and is a leading case upon the subject.

The question arose in this court in 1853, in *Eden v. Lexington 703* etc. R. R. Co., 14 B. Mon. 204 [165], before the enactment of the statute. That was an action by the husband against a railroad company for the alleged negligent killing of his wife. She was killed instantly. The court followed the principle enunciated in *Baker v. Bolton*, 1 Camp. 439, but erroneously assumed that it was decided in that case that, when death resulted, the civil remedy was merged in the public offense.

The court said in the *Eden* case: "The cause of action for injuries to the person dies with the person injured, and it follows, as a necessary consequence, that the cause of action having itself abated, no separate action can be maintained for such damages

as are exclusively consequential. But for aggravated injuries to the person of the wife or child the husband or parent has an independent and separate cause of action for the loss of society of the wife, or the services of the child, as the case may be. This cause of action does not abate by the subsequent death of the wife or child, but the death of either affects the extent of the recovery, as by that event all further claim to the society of the one, or the services of the other, ceases and determines. And the rule still prevails, although the death that produces this effect results from the same injury which gives rise to the action. . . . According to the existing law, there can be no recovery for this injury, inasmuch as the death of the wife was instantaneous, and it is only for the loss that is sustained by the husband, in this respect, from the moment of the injury up to time of the death of the wife, for which any recovery can be had."

The death resulting immediately on the infliction of the injuries, no appreciable time elapsed in which the husband ⁷⁰⁴ could have enjoyed his wife's society, hence no damage could result.

It is perfectly manifest that at the common law a husband could recover damages for the loss of her society from the date of the injury until her death for a negligent act resulting in the injury of his wife, although she died therefrom.

The question here arises as to what effect the statute providing a remedy for injuries to the person by negligence has upon the right of the husband to maintain an action for such injuries for which the common law afforded him redress.

At the common law, although the person injured may have suffered great physical and mental pain, the cause of action was abated by his death. The general assembly, in order to preserve and keep alive such cause of action, provided that every right of action for personal injury, except actions for assault and battery, slander, criminal conversation, and so much of the action for criminal prosecution as is intended to recover for personal injury, shall survive to the personal representative: Gen. Stats., c. 10; Ky. Stats. sec. 10.

To provide a cause of action where none existed the statute of 1854 was enacted, which gave a cause of action to the personal representative of one not in the employment of the railroad, whose life was lost by reason of the negligence or carelessness of the servants or agents, etc., of such railroad. A recovery under section 1, chapter 57, of the General Statutes goes to the estate of the decedent.

This was the section under which the plaintiff, as personal representative of the estate of his deceased wife, recovered in the other action mentioned.

Counsel for appellees cite *Hansford v. Payne*, 11 Bush, 380, to sustain the contention that this action can be maintained, while counsel for appellants cite the ⁷⁰⁵ case of *Conner v. Paul*, 12 Bush, 144, in support of the opposing view.

Hansford's case was not under either section 1 or 3, chapter 57, of the General Statutes. The petition did not charge the life was lost by the willful neglect of the defendants, hence was not under section 3; and as it was not lost by reason of the negligence or carelessness of the proprietor of a railroad or its agents or servants, the action could not be and was not intended to be under section 1.

It was an action against apothecaries, because their prescription clerk, in attempting to fill a physician's prescription, put up croton oil instead of linseed oil. The croton oil was administered to plaintiff's intestate. It was charged, among other things in the petition, that it caused him great suffering and agony and did him serious and irreparable injury, and was the immediate cause of his death.

The action was brought by decedent's personal representative. At common law, had the deceased lived, he could have maintained the action for the agony and suffering resulting from the clerk's mistake, and at his death the cause of action would have ceased, except for chapter 10 of the General Statutes, *supra*, which caused it to survive in the name of his personal representative. For this reason, the court in that case held the petition was good. Under the statements of the petition, no recovery could be had for the death of the injured party.

It was not in issue in the case as to what the rights of a husband were when his wife lost her life by the wrongful act of another, but the judge delivering the opinion in the discussion of the case restated the doctrine of *Baker v. Bolton*, 1 Camp. 439, as sanctioned in *Eden v. Lexington etc. R. R. Co.*, 14 B. Mon. 204 [165].

Had the injured party been the wife instead of the husband, then, certainly, he would have had the right at the ⁷⁰⁶ common law to have maintained an action for the loss of the society of his wife, although her personal representative might have sustained an action to recover damages for mental and physical suffering.

Had the wife survived her injuries, she could have maintained

her action for her mental and physical suffering. Had the husband sustained damages in consequence of his wife's injuries by the "loss of her society," then he could have also maintained his action to recover such damages. Had she lived, he could not recover for her mental and physical suffering, because that was a damage to her; neither could she recover for his "loss of her society," because that was his damage. Both causes of action existed at common law.

The action instituted by McElwain as personal representative was not based on a common-law right, but to enforce a right secured by statute. This statute very much enlarged the rights which had existed at common law. It gave the personal representative the right to recover for the loss of the life, and thus increased many fold the amount which formerly could be recovered. The husband, under the statute (General Statutes), would take the entire amount recovered, subject to the debts of decedent. It was greatly to the advantage of the husband to enjoy the statutory rights instead of those which formerly existed; therefore it cannot be said that the statute diminished the rights of the husband.

We cannot believe that the general assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit, and allow at the same time the husband to maintain one, on his own account, for the same acts or negligence.

In the Hansford case, in discussing the effect of a recovery ⁷⁰⁷ of punitive damages, under section 3, chapter 57, of the General Statutes, the court said: "A recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or any of its consequences." It is the degree of negligence which determines whether the recovery should be compensatory or punitive, but, when the action by the personal representative is based on section 1 of the statute in question, the recovery should be as effectual a bar to any other action for the injury or any of its consequences as if the jury should have added punitive to the compensatory damages.

In *Conner v. Paul*, 12 Bush, 144, it appeared two actions were instituted by the personal representative of the deceased. The mother of deceased qualified as administratrix in Indiana, where the injury was inflicted, and also in Kentucky where the deceased lived.

As administratrix under her Kentucky appointment, she instituted an action to recover for the mental and physical suffering

of deceased. As administratrix under the Indiana appointment, she instituted an action to recover for the loss of life of her intestate.

The acts of negligence were the foundation of each action, and the court held a recovery in one action would bar a recovery in another action.

We conclude that, as the statute gives the personal representative the right to maintain the action for the loss of life of the wife and the consequences of the negligent act producing the injury, the husband cannot maintain the action for the loss of her society. The legislative intent was to increase the elements of damage flowing from the acts or negligence producing death. It was not the intention of the legislature to multiply actions. The husband ⁷⁰⁸ must accept the benefits which the statute secures him in lieu of those he possessed at common law.

Wherefore the judgment is reversed, with directions that further proceedings be had consistent with this opinion.

NEGLIGENCE—DAMAGES—RECOVERY IN STATUTORY ACTION FOR CAUSING DEATH.—Where the statute provides that the deceased's cause of action shall survive, the personal representative may, under such a statute, recover for the loss and deprivation of the survivors; though, in Kentucky, the personal representative, having the right to sue for the deceased's pain and suffering, or to sue for the death, must elect between the two causes of action: See monographic notes to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 619, 638, on actions for injuries to relatives, and *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375, 377, on elements and measure of damages in actions for having caused the death of human beings.

CASES
IN THE
SUPREME COURT
OF
MAINE.

MARSHALL v. BOARDMAN.

[89 MAINE, 87.]

SHIPPING—LIABILITY FOR SEAMAN'S WAGES.—The fact that a master "sails," or "hires," or "takes" a vessel on shares, implies that he fully controls the management of the vessel for the time being, and without anything else appearing, exonerates the owners from personal liability to pay seamen's wages.

SHIPPING—LETTING ON SHARES—LIABILITY FOR SEAMEN'S WAGES.—A part owner of a vessel, let to a master on shares, is not personally liable for seamen's wages, although he procured the charter for the trip made by the vessel during which such wages were earned.

SHIPPING—LETTING ON SHARES—LIABILITY FOR SEAMAN'S WAGES—EVIDENCE.—Conditions or qualifications annexed to the contract of hiring or letting a vessel on shares which would deprive the owner of exemption from personal liability for seaman's wages earned during the term of the lease are not to be presumed; they must be proved.

G. A. Curran and H. H. Gray, for the appellant.

G. E. Googins, for the appellee.

PETERS, C. J. It appears, from the facts agreed upon by the parties, that the plaintiff was employed as a seaman on a schooner, one-sixteenth of which was at the time owned by the defendant, the plaintiff claiming to recover his full wages of the defendant as such owner; that the schooner was sailed by the master "on shares," he taking three-fifths of her earnings and paying the running expenses, and the owners taking two-fifths of the earnings; and that the defendant procured the charters for the two trips made by the vessel during which the wages of the plaintiff were earned.

The question arising on these facts is, whether the master can

be said to have had such possession and control of the vessel as to exonerate the owners from a personal liability to pay seamen's wages. We think an affirmative answer must be given on this proposition.

It is said the master must have the exclusive control in order to clear the owners of such personal liabilities. But the simple statement that a master "sails," or "hires," or "takes" the vessel on shares implies that he fully controls the management of the vessel for the time being. That must be the presumption. Of course, there may be various conditions or qualifications annexed to ⁹¹ the contract of hiring or letting vessels on shares which would deprive owners of any such exemption from liability. But conditions or qualifications affecting the contract are not to be presumed; they must be proved in some way. It is like the hiring and letting of any other kind of property, whether real or personal. The letter yields and the hirer takes possession, and dominion and control presumably follow the rightful possession.

It is contended by the plaintiff that there is evidence that the master had not the exclusive control of the vessel, in the fact that the defendant procured the charters for her employment for the two trips during which the plaintiff's wages were earned. This admission appears to have been made as a part of the case without any explanation whatever. But it should be noticed that these services of the defendant took place after the contract between owners and master was consummated, and nothing appears to connect his acts in any way with the terms of the contract itself. We take it that it was merely a gratuitous assistance rendered for the benefit of the master, although operating, perhaps, beneficially for all concerned. It cannot be an uncommon thing for owners who are out of the possession and control of their vessels to assist masters in such a way. There is no suggestion that the procurement of the charters was without the consent and direction of the master himself, and no indication that the defendant was pretending to exercise any personal right as owner. It would seem to be inconsistent for the master to pay all the running expenses and be entitled to the greater part of the earnings if he were merely an agent for the owners.

The practice of letting vessels on shares, so as to constitute the master an owner *pro hac vice*, was an ancient one held in great favor in this and our mother country during those commercial periods when the business of transportation was carried on in a much smaller way and by the means of a much smaller class of

vessels than at the present day. Among the very many adjudged cases growing out of such business we have not noticed any decision militating against the views expressed by us in this discussion. We need refer to but a few of the cases in effect supporting ⁹² our conclusion. In the early case of *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110, it was held that, "to render an owner of a vessel liable for the contracts of the master, it must be proved that the vessel was in the employment of the owner, that the master was appointed by him, and that the master acted in making such contracts within the scope of his authority." In other words, the presumption that the master is in possession for himself, and not for the owner, must be overcome by some evidence. In *Taggard v. Loring*, 16 Mass. 336, 8 Am. Dec. 140, the court held that where a master hired a vessel for six months, rendering to the owners a moiety of the earnings, and sailed in her himself as master, he was so far the owner of the vessel that he could not be charged with barratry. The case of *Manter v. Holmes*, 10 Met. 402, decides that when the owners of a vessel have let her on shares for a certain time to the master, who is to victual and man her, they cannot maintain an action for freight earned by the vessel during that time; and that such an action can be maintained by the master only. In *Howard v. Odell*, 1 Allen, 85, it was decided that one who received from his debtor a bill of sale of a vessel, absolute in terms, but intended only as collateral security for a debt, but who never took possession nor had the control of the vessel, nor held her out to the world as his property, was not liable for supplies or repairs furnished for her, although registered in his name. In the case of *Thompson v. Snow*, 4 Me. 264, 16 Am. Dec. 263, it appears that the master took the vessel "on shares," those words alone expressing the contract, and this was understood by the court as being a letting by which the master became owner of the vessel pro hac vice in the customary manner of such letting, and the case was heard and determined upon that theory. The case of *Somes v. White*, 65 Me. 542, 20 Am. Rep. 718, decides that the rule of excepting general owners from liability exists in relation to claims sounding in tort as well as in cases of contract, where the vessel is in the possession of the master sailing her on shares. The claim in that case arose from a collision between two vessels.

Judgment for defendant.

SHIPPING—LIABILITY FOR SEAMEN'S WAGES.—A hirer of a vessel on shares, being regarded as the owner for the time in

which he controls her under the contract, and having the benefit of the services of seamen hired by him, no implied assumpsit for compensation for such services can arise against the general owner: *Giles v. Vigoreaux*, 35 Me. 300; 58 Am. Dec. 704. But it has been held that the owner of the vessel remains liable for seamen's wages under a charter party by the terms of which the charterers were to pay the running expenses, not to exceed a certain amount, which amount the captain was to retain for that purpose out of the freight, the captain to "sail her himself," and attend to the collection of freights, etc.; for the phrase "sail her himself" is construed to mean that the captain, as agent for the owner, was to employ the crew: *Sheriffs v. Pugh*, 22 Wis. 273; 94 Am. Dec. 600.

SHIPPING—LIABILITY OF OWNER OF HIRED VESSEL: See note to *Pitkin v. Brainerd*, 5 Conn. 451; 13 Am. Dec. 79, and extended note.

MORRISON v. CLARK.

[89 MAINE, 103.]

JUDGMENTS—RES JUDICATA.—The essential elements of *res judicata* are the identity of the parties and of the issue necessarily involved. It must also appear that the issue which terminated in the former judgment was between the same parties in the same right or capacity, or their privies claiming under them.

JUDGMENTS—RES JUDICATA—EVIDENCE.—If the same evidence will sustain both the present and a former action between the same parties, the judgment in such action is a bar to a subsequent suit.

JUDGMENTS—RES JUDICATA—EASEMENTS—COTENANCY.—In an action of trespass against a husband, who with his wife were cotenants of a right of way on the land on which the alleged trespass was committed, he sought to justify the trespass on the ground that it was committed by license and authority of his wife in the exercise of her right to have a reasonably suitable and convenient way across the land, and it was held that a former judgment against him for trespasses committed on the same side of the land, based on his personal agreement to use a way on the other side of the land was not conclusive against him and his defense to the latter action, and that in such action the wife was entitled to have the reasonableness of the location of the right of way determined by a jury, and, as the husband was not acting in the exercise of his own right, but solely on the authority of his wife, the question of the reasonableness of the location of such way was open to him as a defense.

COTENANCY—RIGHT OF WAY.—HUSBAND AND WIFE, as tenants in common, hold by several and distinct titles, and the wife has an equal right with her cotenant to the use of a way that is reasonably suitable and convenient for the purpose for which it is granted, and she is not bound by a separate agreement of her cotenant made in relation thereto, without her knowledge or consent, and in disregard of her individual rights.

COTENANCY—RIGHT OF WAY.—One cotenant of a right of way has no authority to fix the location thereof in accordance with his own personal preference or caprice by means of a private agreement made with the owner of the servient estate, in entire disregard of the rights and wishes of his cotenant.

JUDGMENTS AGAINST COTENANTS—RES JUDICATA.—A judgment for or against one cotenant is not only not conclusive evidence, but, ordinarily, no evidence at all, against his cotenants.

JUDGMENTS AS ESTOPPEL.—A PARTY ACTING IN ONE RIGHT can neither be benefited nor injured by a judgment for or against him when acting in some other right.

C. E. & A. S. Littlefield and C. M. Walker, for the appellant.

W. H. Folger, for the appellee.

¹⁰⁵ **WHITEHOUSE, J.** This is an action of trespass quare clausum. The defendant admits that the acts complained of in the plaintiff's writ were committed by him on the easterly side of the plaintiff's lot, but claims that they were done in the exercise of a right to pass over the lot acquired by grant to himself and wife and by license of his wife.

The deed to the plaintiff of "lot 34" described in his writ contains a reservation of a right of way to George E. Clark, the defendant, and Lilla B. Clark, his wife, to Rankin street.

The deed to the defendant and his wife shows title in them to an adjoining lot, and "also a right of way ten feet wide over, upon, and across lot 34 . . . on foot and with horse and carriage to Rankin street." The defendant and his wife thus became tenants in common, not only of the lot of land conveyed to them, but of a right of way ten feet wide across the plaintiff's lot: *Stetson v. Eastman*, 84 Me. 366; *Robinson, Appellant*, 88 Me. 17; 51 Am. St. Rep. 367. It does ¹⁰⁶ not appear that, at the date of this deed to the defendant, there was any existing way in actual use across the plaintiff's lot. The deed does not specify upon which side of the plaintiff's lot the way should be located or in what direction it should pass. The defendant and his wife were therefore entitled to have the use and enjoyment of a way as limited and described in the grant, and located upon the plaintiff's lot in such a manner that it would not be unreasonably inconvenient or injurious to the plaintiff, and, at the same time, be reasonably suitable and convenient for the defendant and his wife, having reference to the purposes for which the way was granted, the situation of the lots in relation to each other and to the public street, and all the circumstances connected with the use of the lots and the way in question: *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Johnson v. Kinnicutt*, 2 Cush. 153; *Brown v. Meady*, 10 Me. 391; 25 Am. Dec. 248; *Washburn on Easements*, 285.

It appears that the plaintiff had recovered judgment against this defendant for a trespass on the same lot, in a prior suit, in which the defendant justified his acts on the ground that they

"were done by virtue of a right of way ten feet in width across said lot of the plaintiff, which right of way was, at the time of the alleged breaking and entering, owned by said defendant." In addition to the general verdict of guilty, found in that case, the jury also returned a special finding that the defendant had made an agreement with the plaintiff to use a right of way on the westerly side of the Morrison lot as claimed by the plaintiff.

The defendant's cotenant, Lilla B. Clark, was not made a party to that suit. Her name was not mentioned in the pleadings, and this special finding was distinctly restricted to this defendant, George E. Clark. Nor did it appear that in making that agreement, to use a way on the westerly side, the defendant acted with the knowledge and consent of his cotenant or in any respect in her behalf.

In the case at bar it appears that: "The defendant offered to prove that the acts complained of in the plaintiff's writ were done by him under license and authority from his wife, Lilla B. Clark, and that they were committed by him within a right of way, ten ¹⁰⁷ feet wide, on the easterly side of the lot in question, where the way would be the most convenient for the defendant and wife and not unreasonably inconvenient or injurious to the plaintiff, instead of upon the westerly side thereof as mentioned in the judgment aforesaid, which evidence the court excluded, upon the ground that it affords no justification for the defendant by reason of the judgment against him already shown in evidence."

Thereupon the court directed a verdict to be rendered for the plaintiff for nominal damages assessed at one dollar. To these rulings, excluding the evidence offered in defense and directing a verdict for the plaintiff, the defendant excepted and on his exceptions the case is now before the law court.

It is the opinion of the court that the judgment in the former case is not conclusive against the defendant upon the facts disclosed in this action, and that the evidence offered in defense should have been admitted.

The two leading and essential elements of the doctrine of res judicata are the identity of the parties to the suit and the identity of the issue necessarily involved: Bigelow on Estoppel, 27-46. Hence to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the subject matter in controversy was brought directly in question by the issue in the proceedings which terminated in the former judgment; and whether the former suit was between the same parties in the same right or

capacity, or their privies claiming under them: *Lander v. Arno*, 65 Me. 26; *Bigelow v. Winsor*, 1 Gray, 299. And one of the most satisfactory and reliable tests of the question whether a former judgment between the same parties is a bar to the present suit is to inquire whether the same evidence will sustain both the present and former actions. The issue will be deemed the same whenever, in both actions, it is supported by substantially the same evidence. On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other: *Freeman on Judgments*, sec. 259, and cases cited.

With reference to the pending case, it is plain that the former judgment against this defendant would not be a bar if this action ¹⁰⁸ had been against Lilla B. Clark, the defendant's cotenant. As already noted, she was not a party to the former proceeding, had no right to appear and take part in that trial, exercise any control over the proceedings, or take any measures to disturb the verdict rendered. The parties to the litigation would not be the same, nor would they stand in an attitude, or relation, to each other having the same effect, as if they were identical. There was no such mutual or successive relationship between them to this right of way as would be required to establish a legal privity between them: 1 *Greenleaf on Evidence*, sec. 189. As tenants in common, they were entitled to the use of one passageway and only one. In no event would each be entitled to the use of a separate way without the consent of the plaintiff. In the absence of a definite location in the grant, it was competent for the parties to fix the location by a joint agreement between the cotenants of the right of way, on the one part, and the plaintiff, the owner of the servient estate, on the other. In the absence of such an agreement, or in the event of a disagreement between the two owners of the right of way, the location must still be made by the plaintiff with due regard to the rights and convenience of all parties interested; and, if consistent with his own interests, in such a manner as to afford a reasonably suitable and convenient way for the defendant and his cotenant Lilla B. Clark.

It is sufficiently evident from the special finding of the jury that the verdict in the former action was based on the individual agreement of George E. Clark to use a way on the westerly side of the plaintiff's lot, and not on the easterly side, where the alleged trespass was committed. But it was not shown that Lilla B. Clark in any way participated in that agreement, or ever as-

sented to it or acquiesced in it. She had an equal right with her cotenant to the use of a way that was suitable and convenient for the purposes for which it was granted. She would not be bound by the separate agreement of her cotenant, made without her knowledge or consent and disregard of her individual rights. Tenants in common hold by several and distinct titles. With respect to his share each cotenant has all the rights, except that of sole possession,¹⁰⁹ which a tenant in severalty would have: 1 Washburn on Real Property, 430. It has been uniformly held that one tenant in common cannot, as against his cotenant, grant an easement in the common property to a stranger: *Clark v. Parker*, 106 Mass. 557; *Crippen v. Morss*, 49 N. Y. 67; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667; *Merrill v. Berkshire*, 11 Pick. 274; Washburn on Easements, 46. In *Crippen v. Morss*, 49 N. Y. 67, the court say: "A tenant in common cannot, by grant, or by operation of an estoppel, or otherwise, confer any right and privileges which he did not have himself. The most that can be claimed for such a grant, or act of the owner, is that it may operate by way of estoppel against him and his heirs and those claiming under him." In *Merrill v. Berkshire*, 11 Pick. 274, an attempt was made to set up the agreement of one tenant in common as against his cotenant, respecting the damages for laying out a highway over the common property, but the court said: "It is very clear that the land of one tenant in common cannot be encumbered, or in any way injuriously affected, by any agreement of his cotenant."

But if one tenant in common of a right of way is authorized to fix the location of the way in accordance with his own personal preference or caprice by means of a private agreement made with the owner of the servient estate, in entire disregard of the rights and wishes of the cotenant, it is plain that one tenant in common will always have it in his power by his independent acts to prejudice and "injuriously affect" his cotenant. Such a doctrine would not only be in clear violation of the well-settled general principles governing the respective rights and obligations of tenants in common, but is manifestly unreasonable and unjust.

The authorities also uniformly support the general proposition that a judgment for or against one tenant in common of property is not only not conclusive evidence, but ordinarily no evidence at all, against his cotenant: *Freeman on Judgments*, sec. 171; 12 Am. & Eng. Ency. of Law, 96, and cases cited.

It follows that if Lilla B. Clark had been directly named as de-

fendant in the pending action, neither the separate agreement of George E. Clark invoked in the former suit, nor the judgment there¹¹⁰ rendered, could have been invoked as an estoppel against her. Her liability might be determined upon different evidence and be controlled by a different principle. In the case at bar, the defendant offered to prove that a way on the easterly side of the plaintiff's lot was more convenient for the defendant and his wife, and not injurious or unreasonably inconvenient for the plaintiff. It does not appear that this question of the reasonableness of the location has ever been determined. The defendant's cotenant, Lilla B. Clark, would have had a right to have it passed upon. If the defendant did not act in the exercise of any right of his own, but solely under license and authority of his cotenant, the question of the reasonableness of the location was equally open to him in this case. The former judgment was rendered against him for acts done in the assertion of his own right. In this case he seeks to defend acts done by him under the direction of his cotenant in the exercise of her distinct and separate right. The fact that he was defendant in the former action may be immaterial; and his liability in the present suit not essentially different from that of any other agent who might be employed by Lilla B. Clark to drive her carriage over a way which she had a right to use across the plaintiff's lot. "It is a rule of both the civil and common law," says Mr. Freeman, "that a party acting in one right can neither be benefited nor injured by a judgment for or against him, when acting in some other right": Freeman on Judgments, secs. 156, 164, and cases cited.

The judgment in the former suit, therefore, will not operate in this case as a personal estoppel against the same defendant, acting in a different right.

Exceptions sustained.

JUDGMENTS—RES JUDICATA, WHAT CONSTITUTES.—That a former adjudication may constitute an absolute bar to a subsequent action there must be, as between the two actions, identity of persons, of subject matter, and of cause of action: *Wright v. Grifey*, 147 Ill. 496; 37 Am. St. Rep. 228, and note. To constitute a judgment in one suit a bar to a second suit, it must appear that the issue in the second suit upon which the judgment is brought to bear was a material issue in the first suit and necessarily determined therein, and that the former judgment was upon its merits: *Liddell v. Childester*, 84 Ala. 508; 5 Am. St. Rep. 887; *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. Instances of *res judicata*: See note to *Hank v. Evans*, 76 Iowa, 593; 14 Am. St. Rep. 250. See monographic note on "Proof of *Res Judicata*," in *Fabey v. Esterley Machine Co.*, 8 N. Dak. 220; 44 Am. St. Rep. 562.

JUDGMENTS—RES JUDICATA—EVIDENCE.—If it is doubtful whether a second suit is for the same cause of action as the first, it is a proper test to consider whether the same evidence would sustain both, and what was the particular point or matter determined in the former action: *Hodge v. Shaw*, 85 Iowa, 137; 39 Am. St. Rep. 290; *Gallaher v. Moundville*, 84 W. Va. 780; 26 Am. St. Rep. 942, and note.

JUDGMENTS—RES JUDICATA AS AN ESTOPPEL: See extended note to *Standish v. Parker*, 2 Pick. 20; 13 Am. Dec. 395.

IN RE BROCKWAY MANUFACTURING COMPANY.

[89 MAINE, 121.]

CORPORATIONS—PROPERTY OF AS TRUST FUND.—The stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien thereon and the right of priority of payment over any stockholder.

CORPORATIONS—PRIORITIES BETWEEN CREDITORS AND STOCKHOLDERS.—The stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefits of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum, after all demands on it are paid.

CORPORATIONS, PROPERTY OF AS TRUST FUND—MISAPPROPRIATION OF BY AGENT.—Creditors of a corporation may hold its agent personally liable for wasting its assets needed to satisfy their claims, on the ground that such action on his part constitutes a misapplication of trust funds.

CORPORATION—PROPERTY OF AS TRUST FUND—MISAPPLICATION OF BY TREASURER.—The treasurer of a corporation holds the money in its treasury to answer for the corporation debts if necessary; and, if he withdraws it, except according to law, he does so subject to a trust for the payment of such debts, and it is immaterial whether he gets the money by fair agreement with his associates or by a wrongful act.

CORPORATIONS—PURCHASE OF STOCK BY OFFICER—LIABILITY TO CREDITORS.—If the money of a corporation is used by its treasurer in the purchase of its stock by himself and other stockholders for themselves, with the consent of all the stockholders and officers of the corporation, he is personally liable for the money so converted and misapplied contrary to the rights of the creditors of the corporation.

INSOLVENCY—EQUITY.—In the allowance of debts and claims in bankruptcy and insolvency, the court proceeds upon principles that are equitable in their character.

N. & J. A. Morrill and J. W. Mitchell, for the appellant.

A. R. Savage and H. W. Oaks, for the appellee.

¹²³ **PETERS, C. J.** After the previous decision in this case, as see *In re Brockway Mfg. Co.*, 87 Me. 477, the appellant, Mitchell, the assignee of Haskell, the insolvent debtor, was allowed

to amend his claim agreeably to that decision, by substituting therefor an account for cash paid by said Haskell for the use of the Brockway Manufacturing Company and interest, amounting in all to fifteen hundred and seventy-one dollars and seventy-three cents. At the hearing on the appeal in the ¹²⁴ court below, Robinson, the assignee of the corporation, was allowed to amend his objections to the claim as originally filed; and, in addition to a general objection alleging that upon a full settlement there was nothing due from the corporation to said Haskell, he specifically stated, as a further ground of objection, that "on the twenty-sixth day of December, 1888, said Haskell, jointly with five other individuals, signed and delivered to one Samuel G. Damren six notes, each for the sum of four hundred and fifty dollars, with interest, and payable respectively in four, eight, twelve, sixteen, twenty, and twenty-four months from date; that said Haskell, without lawful authority, took and appropriated the funds of the Brockway Manufacturing Company for the payment of said notes with interest thereon, amounting in all to the sum of two thousand eight hundred and eighty-nine dollars, and that said Haskell thereby became bound to account for said sums to the Brockway Manufacturing Company, and to pay the same to the said Brockway Manufacturing Company, for the benefit of its creditors; and said Robinson claims to offset said amount, . . . together with interest thereon, . . . the whole amount being three thousand one hundred and seventy-seven dollars and ninety cents, against the claim of said Mitchell as assignee of said Haskell as aforesaid."

At the hearing in the court below, the following facts were admitted by the parties: That on the 26th of December, 1888, I. N. Haskell and five others bought out all the shares of the Brockway Manufacturing Company which had then been issued from the original owners, with the exception of four which were retained by said owners; and in payment therefor gave the six notes above referred to in the amended objection filed by the appellee, twenty-seven of said shares, of the par value of one hundred dollars each, being transferred directly to the purchasers of said stock, and a portion, at a later date, viz., January 9, 1889, but as a part of the same transaction, being surrendered to the treasury as treasury stock, by the original holders; that by this transfer the signers of said notes received stock as follows, viz., I. N. Haskell five shares; the others, various amounts aggregating twenty-two shares; and forty-two shares were surrendered into the ¹²⁵ treas-

ury and canceled; that I. N. Haskell was then made director and treasurer of said corporation, and continued to hold both offices until the filing of the petition in insolvency, August 26, 1892; that from time to time, as the above notes matured, they were paid by said Haskell from the funds of the Brockway Manufacturing Company; that this was done without fraudulent purpose on the part of said Haskell or the other stockholders, and with the assent of all the stockholders and directors of the Brockway Manufacturing Company, including the signers of the notes, and was in accordance with the understanding between the parties to said transfer, at the time when the notes were given, December 26, 1888, but without any vote either by the stockholders or directors authorizing such payments, and that no account of such payments appear upon the account books of the corporation.

The appellee admitting that Haskell had paid, for the use of the company, the sums specified in the claims filed against the corporation in this case, claimed that there should be allowed, in set-off or recoupment against Haskell's claim, the full amount of money applied, as aforesaid, by him to the payment of the six notes dated December 26, 1888, or so much thereof as would be sufficient to cancel the claim of fifteen hundred and seventy-one dollars and seventy-three cents, while the appellant claimed that, at most, only Haskell's proportionate part of said amount, viz., five twenty-sevenths, agreed to be the sum of six hundred and ten dollars, should be allowed.

The presiding justice thereupon ruled that the appellee would be entitled to be allowed in setoff against the claim of the appellant said sum of six hundred and ten dollars, and no more, and entered a decree accordingly. To this ruling the appellee excepts, and prays that his exceptions may be allowed.

We think that, in this proceeding, Haskell must answer for the full amount, or so much of it as is necessary, to balance the claim here preferred by his assignee. Whatever rule might obtain, if this were a proceeding to enforce the liabilities of a stockholder under our statutes, we think that ¹²⁶ the case discloses in its facts a diversion of its property and assets to the detriment of creditors. The case is very like that of a trustee secretly applying the trust property to his own use. To hold otherwise would be a contradiction of the plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and that its creditors have a lien thereon and the right to priority of payment over any stock-

holder. The payment of the amount claimed by Haskell for the benefit of the corporation amounted in law to an application of that sum in reduction of his indebtedness to the company, and therefore a reduction of its assets to that extent. It is well settled by numerous authorities that the stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid: *Wood v. Dummer*, 3 Mason, 311; *Sanger v. Upton*, 91 U. S. 60. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds.

We are of the opinion, therefore, that Haskell from time to time had these funds in his possession, belonging to the corporation, which he was bound to apply only to the legitimate purposes of the corporation; and that if he chose to apply them otherwise while acting as treasurer or director, either for his own benefit or for the benefit of anyone else, he thereby became responsible for the whole amount so converted. So long as he held the money in the treasury of the corporation, it was there to answer for its debts if necessary; and it should have been devoted to that object so long as it might be required for that purpose. If he withdrew it, except according to law, he did so subject to that trust—the trust for the payment of debts of the corporation, and needed for that purpose: *Williams v. Boice*, 38 N. J. Eq. 364; and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act: *Bartlett v. Drew*, 57 N. Y. 587.

¹²⁷ The defendant in his argument admits that the transaction detailed above amounted undoubtedly to a withdrawal of a portion of the principal of the capital stock of the company, within the meaning of the Revised Statutes, chapter 46, section 37; and that the payment for the twenty-seven shares of stock out of the funds of the company, by which transaction Haskell received the par value of his stock without cost to himself, was illegal as against its creditors. But he argues that the only duty of Haskell as treasurer was as agent of the company; and he urges that his only duty in relation to the funds of the company was to keep them safely and to pay them out, or otherwise dispose of them, as he might be directed by the corporation. And he cites from the

opinion in the case of *Taylor v. Taylor*, 74 Me. 584, that: "He is accountable to the corporation and to the corporation alone, and to the corporation he has done no wrong." That case was a bill in equity by an assignee in insolvency to vacate a fraudulent preference, and it was sought to sustain the bill upon the further ground of a breach of trust. But the court held that, under the allegations in the bill, it could not be supported upon that ground. It was sustained as a fraudulent preference under the insolvent law. It will thus be seen that the two cases are dissimilar. In our view, as already expressed, he is accountable, and because he has done wrong to the corporation by an unwarranted withdrawal of its funds for an illegal purpose whereby creditors have been wronged.

In the allowance of debts and claims in bankruptcy and insolvency, the court proceeds upon principles and considerations that are equitable in their character. It has been accordingly held that an assignee may vacate a preference which was given by the directors of an insolvent corporation to a firm of which a director was a member, although it was given more than four months before the commencement of the proceedings in bankruptcy: *Bradley v. Farwell*, 1 Holmes, 433.

According to the agreement of the parties, the entry will be made, decision of the judge of insolvency affirmed. Appeal dismissed.

CORPORATIONS—STOCK AS A TRUST FUND.—The capital stock of a corporation is a trust fund for the benefit and security of the corporate creditors, and the directory or governing body of the corporation are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. These uses are to meet and discharge the liabilities of the corporation, and to restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand after discharging such liabilities: *Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1; 42 Am. St. Rep. 17. The capital stock constitutes, as between creditors and stockholders, a trust fund for the payment of the debts: *Missouri etc. Smelting Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746, and note; and the directors are the trustees for that purpose: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331, and note.

CORPORATIONS—PRIORITIES BETWEEN CREDITORS AND STOCKHOLDERS.—The capital stock and other property of a corporation constitute, as between creditors and stockholders, a trust fund for the payment of the debts; and if such property has been divided among the stockholders, leaving debts unpaid, the stockholders are in equity bound to refund: *Missouri etc. Smelting Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746.

CORPORATIONS—ASSETS OF, AS A TRUST FUND.—The authorities are divided on the question as to whether the assets of an insolvent corporation are a trust fund for the benefit of the corpo-

ration creditors: See *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644, and note; *Thompson v. Huron Lumber Co.*, 4 Wash. 600; *Hollins v. Brierfield etc. Co.*, 150 U. S. 371; *Brown v. Grand Rapids etc. Co.*, 58 Fed. Rep. 286; *Gould v. Little Rock etc. Ry. Co.*, 52 Fed. Rep. 680. See extended note to *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 767-771.

CORPORATIONS—POWER TO PURCHASE ITS OWN STOCK. The stockholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock; as to it they cannot occupy the status of innocent purchasers, and when they have in their hands any of this trust fund, they hold it cum onere, subject to all equities which attach to it: *Commercial Nat. Bank v. Kurch*, 141 Ill. 519; 83 Am. St. Rep. 331, and note.

CORPORATIONS—INSOLVENCY—EQUITY.—Equity regards the property of a corporation as a fund held in trust for its stockholders while it is solvent, and for the payment of its debts when it becomes insolvent; and if others than bona fide creditors possess themselves of it, then, in case the corporation becomes insolvent, they hold it charged with a trust in favor of its creditors, and such trust a court of equity will enforce: *Atlas Nat. Bank v. More*, 152 Ill. 528; 43 Am. St. Rep. 274.

COOMBS v. BEEDE.

[89 MAINE, 187.]

ARCHITECTS ARE NOT CONTRACTORS, but merely agents of the owners in the construction of buildings for the latter.

ARCHITECTS.—THE RESPONSIBILITY RESTING ON AN ARCHITECT is essentially the same as that which rests upon an attorney to his client, or upon a physician to his patient, or which rests upon anyone to another, where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed.

ARCHITECTS—RESPONSIBILITY OF.—The undertaking of an architect implies that he possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily and reasonably well, and that, in a given case, he will exercise his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect, and there is no implied promise that miscalculations will not occur.

ARCHITECTS—RIGHT TO RECOVER COMPENSATION—MISCALCULATION.—In an action by an architect to recover for services, it is no defense for the owner, in the absence of allegations of fraud or mistake, or contract of warranty or guaranty, that the services were not beneficial to him for the reason that they were performed in a manner contrary to and in excess of his express direction, provided the architect has exercised his best skill and judgment but has made a slight miscalculation as to the cost.

G. C. Wing, for the appellant.

F. L. Noble and R. W. Crockett, for the appellee.

188 PETERS, C. J. It is not questioned that the plaintiff, a professional architect, was employed by the defendant to prepare

plans and specifications for a house which the defendant intended to have built for himself in the city of Lewiston. On the trial of this action, brought by the plaintiff to recover compensation for services rendered by him in such employment, the defendant sought to establish that, although certain services were rendered by the plaintiff, such services were not beneficial to him, for the reason that they were performed in a manner contrary to his express direction and wishes.

In an examination of the merits of the controversy between these parties, we must bear in mind that the plaintiff was not a contractor who had entered into an agreement to construct a house for the defendant, but was merely an agent of the defendant to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon anyone to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of ¹⁸⁹ judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.

In a case at nisi prius in one of our counties, where a controversy arose very similar to the present, the defendant there contending that the plans called for a too expensive house, and that there had been a departure from the instructions given by the employer, Haskell, J., gave a ruling, which we adopt as an acceptable statement of the law here, as follows: "The plaintiffs continued in the execution of the plans; they procured the details and perfected the entire set of plans. For some reason those plans were rejected by the defendants. The plaintiffs say that it was because they did not give the house sufficient size and capacity and arrangement to suit them, and that they preferred an

entirely different house, a house of different dimensions and different architectural proportions. The defendants say it was because they found the plans impracticable, and that the arrangement of the plans called for so great an outlay that it rendered it too expensive for them to be carried out and adopted, and they say that that was on account of the mistake of the plaintiffs in not properly advising them and in deceiving them as to the practicability of the plans. Now, gentlemen, in determining the rights of the parties, it is well to consider what the legal duty of the plaintiffs was to the defendants. The architect is skilled in the art of building houses. Those who employ him have a right to his best judgment, to his skill, to his advice, to consultations with him, and to his absolute fidelity and good faith, and when the architect has contributed these things to the person who employs him, his duty has been fulfilled."

In the case at bar, the defendant, not relying on any charge against the plaintiff of fraud or negligence, set up at the trial that there was a special promise that the plans should not call for a house to cost exceeding two thousand five hundred dollars, and contended that, inasmuch as the plans called for a more expensive house than that sum would build, nothing was recoverable for plaintiff's services. And in relation to such contention the presiding justice gave the following ¹⁸⁰ instruction: "Well, if that is true, if Mr. Coombs was explicitly told, in addition to the other things, that the building he was designing must not cost over two thousand five hundred dollars, that he was to make plans and specifications for a building to cost not over that, why, then, Mr. Coombs, the plaintiff, should have either made plans accordingly, or frankly told Mr. Beede that he could not do it, and declined to do it. If he undertook to make plans with that restriction made to him specifically, why then he must do it before he can recover any pay."

We think this instruction was misleading and without evidence upon which it could be reasonably based. It punishes the plaintiff for what might be merely an honest mistake or miscalculation. It leaves wholly out of consideration the elements of care and good faith. It does not even require that the plaintiff bound himself to the agreement set up by the defendant. The ruling implies a guaranty or warranty, when none was testified to or really pretended.

Of course, it would be too much to say that parties could not make such a shadowy contract as the defense contends for, but

it would be so strange and unusual a thing to do, that clear and convincing evidence should be required to prove it. And the testimony exhibits none such to our minds.

Skipping the testimony of the defendant as less adroit and less spirited than that of his wife, who was much the more active of the two in the transaction, we incorporate her statement here, as follows:

"Q. Won't you state to the jury the conversation and what took place? A. They had some talk about the fifteen hundred dollar cottage that they had been talking about previously, and conversation was general with regard to the fifteen hundred dollar cottage; and something was said—I think I spoke myself first—about putting on the other story; spoke about its being better economy. Mr. Coombs said, 'Yes, if we studied economy, it certainly was economy to build a double tenement,' and Mr. Beede asked him what it would cost extra to put on the other story and make a double tenement. ¹⁹¹ He said he thought one thousand dollars. Then Mr. Beede said, 'Well, perhaps you can tell Mr. Coombs something about what kind of a house you want.' I said: 'I don't know what we could have for that money so well as he does, he understands that better than I; but one thing, Mr. Coombs, I don't want it to exceed the twenty-five hundred dollars, and I would rather you would cut it down to twenty-two; don't you think you could?' He figured a moment and said he hardly thought we could including the plumbing, but for twenty-five hundred dollars we could build a house complete. Mr. Beede said if he could make plans for a house to be built, not exceeding twenty-five hundred dollars, he might go ahead, and Mr. Coombs said he would do so, and he would send me up a sketch of the ground floor to show me what I could have for size.

"Q. Did he do so? A. He did. He told me I might change over whatever I pleased. Something about the sink, I believe, I wanted differently. I told him that the arrangement of the rooms was all right, I guessed.

"Q. Now to come to the next conversation you had with him? A. Then after I carried that sketch down, he sent me up a little sketch of what the elevation would be and I looked that over, and I thought it was rather more elaborate than what I expected for twenty-five hundred dollars and talked with some of my friends about it, and they seemed to think the same; the piazza, I spoke of that, and they said they should judge that piazza would

cost two hundred and fifty dollars. I went down and talked with Mr. Coombs, told him that I felt that it was a little extravagant. He said he guessed not; but I thought he felt as though it would perhaps overrun twenty-five hundred dollars, and asked him: 'What do you think such a house ought to cost?' and he said: 'Well, possibly three thousand dollars.' I said: 'We can't do that; we want a twenty-five hundred dollar house, and we must cut this down,' and he said: 'You don't want to spoil your house for a few hundred dollars.' I said: 'We are willing to have it a little plainer rather than put in more money.' He said: 'Well, just ¹⁹² as you say, I will cut that piazza down, make less posts, take off the fancy work around the rail, and so forth, and cut it down,' and he did so on the final sketches."

By this statement it does not appear that the plaintiff was to prepare plans for any particular kind of house to cost two thousand five hundred dollars, excepting that it was to be a two tenement house with one tenement over the other. Could not the plaintiff have planned a house answering this description which would not have cost that sum or even half that sum, if allowed to do so? But the difficulty was that the defendant's wife not only wanted the expenditure not to exceed two thousand five hundred dollars, but she wanted at the same time a house worth much more than that sum, and the architect was trying in good faith to accomplish the desired result as best he could. After the plaintiff had engaged to make the plans, and not before, the defendant calls on his wife, according to her testimony, to inform the plaintiff what kind of a house she wanted. Was it expected that he had promised to secure to her a house to her liking for two thousand five hundred dollars irrespective of actual cost or worth, and that he was agreeing to expend his services gratuitously if he did not succeed in doing so? We see nothing even in the defendant's side of the case justifying such a position. The plaintiff certainly could have reduced the cost upon the plans, and have earned his compensation, if the wife had permitted him to do so.

The plaintiff gives a different version of the transaction, denying that any particular limit was fixed within which he was required to bring the cost of the house, other than that the wife desired to get as much of a house as she could for as small a price as possible, and he did all he could to assist her in her ideas. We have no doubt ourselves that there were talks about two thousand five hundred dollars as a proximate but not conclusive price, and that there were no rigorous or unalterable instructions or

conditions about it. The plaintiff says that after the plans were first completed the wife required expensive alterations to be made in them, and, while she does not deny the fact, she is not willing to admit that she remembers it.

The bids which came in after the plans were advertised were disappointing, there being but four in all and ranging in amount ¹⁹³ from three thousand three hundred dollars to four thousand four hundred dollars, showing the moral impossibility of an architect being able to fix precisely the cost of any building if the cost is to be measured in any such capricious way as by the bids of contractors. It was at an unfavorable time of the year, when the contractors had on hand all the work they could do, and still the plaintiff, by his perseverance, virtually obtained afterward a bid for three thousand one hundred dollars, which the defendant refused to accept, nor would he or his wife consent to cut down the plans so as to obtain a bid within the price desired. And so the plaintiff advised the wife to postpone the matter until spring, when the conditions would be more favorable, and she frankly accepted the advice.

There was, however, no waiting till spring before the defendant had his house built. He says he was informed by several persons that he would not be obliged to pay for the plans unless he used them, and he concluded to buy his materials and hire the labor by the day. His wife had become sufficiently posted, by her experience with the plaintiff, and remembrance of his work, to enable her to make sketches of what she wanted, and so she, with the assistance of the carpenter in her service, acted as architect herself. And the defendant during the same fall and winter erected a house and stable on their lot at a cost of over three thousand five hundred dollars. The wife says that the house built by her "was brought to the same degree of completion that a house would have been by his [plaintiff's] specifications for a little less than two thousand seven hundred dollars." So that plaintiff's calculations, tested by actual cost instead of by contractors' bids, were less than two hundred dollars of variance from the standard which the defendant and his wife pretend was prescribed for him by them.

We can perceive no ground upon which, as the testimony stands, the verdict could have been rightfully rendered. Even if the defendant's version of the facts be true, then the undertaking of the plaintiff was to make plans for a house to cost two thousand five hundred dollars, and no more, and if, acting in good

faith, he exercised his skill and ability in an endeavor to bring about that result, that is all that could be expected or required of him; and no defense is established against his claim even if he failed in his attempt. But if ¹⁹⁴ the house designed by him could be built for less than two thousand seven hundred dollars, it could hardly be called a failure, especially in view of the interferences on the part of the defendant's wife; nor a failure if the plaintiff could have so altered his plans as to reduce the house in price, and it seems to us preposterous to say that he could not, and he was willing to make alterations and the defendant or his wife would not consent thereto.

Motion sustained.

ARCHITECTS—DUTY TO EXERCISE SKILL.—An architect is presumed to possess the skill and ability necessary for the practice of his profession, and will not only be liable in damages for defects in his plans, but, it seems, cannot recover for them. He may be liable for defects in his plans or superintendence, resulting from his lack of reasonable skill and diligence, notwithstanding the adoption of his plans or the ratification of his superintendence by acceptance of the building without objection, if the defects are patent to an expert, but latent to a nonexpert: *Shipman v. State*, 43 Wis. 381. An architect employed to furnish the plans for a building and superintend its construction is liable for damages if, through his lack of skill or care, the foundations are so defective as to cause the walls to fall: *Schreiner v. Miller*, 67 Iowa, 91; 56 Am. Rep. 339.

ARCHITECTS—RECOVERY BY—COST OF BUILDING NOT TO EXCEED FIXED AMOUNT.—Where plans are required for a building not to exceed a certain sum, or are accepted on condition that it can be erected for a given amount, there can be no recovery by the architect unless the building can be erected for the sum named: *Walsh v. St. Louis Exposition etc. Assn.*, 101 Mo. 534. In *Ersine v. Johnson*, 23 Neb. 265, the architect was held liable for a mistake in the plans which increased the cost of the building.

MARSTON v. KENNEBEC MUTUAL LIFE INSURANCE CO.

[89 MAINE, 266.]

INSURANCE—LIFE—APPLICATION DRAWN BY AGENT—FALSE ANSWERS.—If an application for life insurance is drawn by the agent of the insurer, and the answers to the interrogations contained therein are written by him in filling out the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument.

EVIDENCE.—A WRITTEN INSTRUMENT may be shown to be void by parol evidence; and it may be thus attacked and overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the contract.

FRAUD—ESTOPPEL.—If fraudulent and false representations are made with the knowledge and advice or upon instruction of the

party seeking to take advantage thereof, he is estopped from setting up his own fraud, and parol evidence thereof is admissible to establish the estoppel.

INSURANCE—LIFE—APPLICATION DRAWN BY AGENT—FALSE ANSWERS.—If an application for life insurance is drawn by the agent of the insurer, and the answers to interrogatories contained therein are written by such agent, without fraud or collusion on the part of the applicant, parol evidence is admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the insurer made with full knowledge of all the facts, and he is estopped from controverting the truth of such statements.

INSURANCE—LIFE—APPLICATION DRAWN BY AGENT. If an application for life insurance is drawn by an agent, for the insurer, and the answers to interrogatories contained therein are written by him without fraud or collusion on the part of the applicant, parol evidence is admissible to show the actual statements made by the latter at the time of the filling of the application, although it may contradict the answers as written by the agent.

INSURANCE — LIFE — POLICY, WHEN GOVERNED BY STATUTE.—Although a written application for life insurance contains a stipulation that "statements made to an agent not herein written shall form no part of the contract to be issued hereon," such stipulation is inferior to, and must be controlled by, a statutory provision that "such agents and the agents of all domestic companies shall be regarded in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk, and all matters connected therewith. Omissions and misdescriptions known to the agents shall be regarded as known to the company and waived by it as if noted in the policy." Statutes are paramount to contracts or stipulations therein which are in conflict with such statutes.

INSURANCE—AN APPLICANT FOR LIFE INSURANCE is presumed to answer truthfully all questions contained in the application.

INSURANCE—ANSWERS TO INTERROGATORIES.—An insurer, by receiving an application for life insurance with questions therein contained partially answered and issuing a policy thereon, thereby waives the imperfections in the answers, and renders the omission to answer more fully immaterial.

J. H. Drummond and J. H. Drummond, Jr., for the plaintiff.

H. M. Heath and C. L. Andrews, for the defendant.

200 **FOSTER, J.** This case comes up on report. It is a suit upon a policy of life insurance to recover five thousand dollars, brought by the executrix of the last will of Daniel E. Marston, who entered into a contract of insurance with the defendant company. The contract is evidenced by two written instruments—the application, signed by the deceased, and the policy signed by the officers of the company. The application contained various questions to be answered by the applicant, and certain statements, all of which were therein declared to form the basis of the contract, and at the close were the following certificates signed by the applicant:

1. "I have verified the foregoing answers and statements and find them to be full, complete, and true; I do also adopt as my own, whether written by me or not, each foregoing statement, representation, and answer, and I agree that they are all material, and that statements made to an agent not herein written shall form no part of the contract to be issued hereon."

2. "I do hereby declare and warrant that the foregoing ²⁷⁰ answers and statements are full, complete, and true; and I agree that this declaration and warranty, together with the preceding agreements, shall form the basis of the contract between the undersigned and the Kennebec Mutual Life Insurance Company, and are offered to said company by me as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on this application; and if there has been any concealment, misrepresentation, or false statement, or statement not true, made herein, and if I or my representatives shall omit or neglect to make any payment, as required in respect of amount, place, and time of payment, by the condition of such certificates, then the certificates to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company," etc.

The policy issued upon this application contained, among other provisions, a stipulation that it was issued upon the condition that the statements and declarations made in the application were in all respects true, and that the application was the basis and a part of the contract of insurance.

Among the several questions propounded in the application, were the following: "6. Has any company, society, or order declined to grant you a policy of membership? If so, name them and when. 7. Have you ever been examined for life insurance or membership by any physician with an unfavorable result?"

To each of these questions the answer was "No."

The defendant claims that these answers were not true, and introduces in evidence the application of the deceased to the Provident Aid Society, made five years previous, wherein the following question and answer appeared: "Has any proposal or application for life insurance, or admission to any order, assessment association, or relief society, ever been made and declined or withdrawn, or upon which a policy or certificate has not been issued? If so, state full particulars." Answer: "Rejected by Ancient Order. Did not give family history."

It also introduces the records of the local lodge of the Ancient

Order, wherein is a duplicate record of the report of the recorder,²⁷¹ and upon which appears the following: "Names of rejected applicants: D. E. Marston. Cause: Family history." It also introduces a copy of the original application, upon which is the indorsement of the medical examiner rejecting the applicant.

To meet this position of the defense, the plaintiff introduces the testimony of Mrs. Marston, wife of deceased, and Dr. Edward P. Marston, his son. The substance of their testimony is, that they were present at the time the agent of the defendant wrote out the application, and that the applicant, in answer to questions 6 and 7, stated to him that he had been rejected by the Ancient Order of United Workmen, and gave the circumstances attending the rejection and the cause of it; that after being informed of the circumstances, the agent said: "I shouldn't call that a rejection," and advised him to answer the questions "No."

The defendant objects to the introduction of this testimony upon two grounds: 1. That it tends to vary or contradict a written contract by parol; 2. That the clause in the application—"I do also adopt as my own, whether written by me or not, each foregoing statement, representation and answer, and I agree that statements made to an agent not herein written shall form no part of the contract to be issued hereon"—informed the applicant of the limitations upon the authority of the agent to waive any of the provisions of the contract or to bind it by his knowledge, and that the knowledge of these limitations is binding on the plaintiff, and for this reason also the evidence is not admissible.

To these positions the plaintiff claims that the knowledge and instructions of the agent, based upon the information imparted to him by the applicant, estops the defendant from setting up the alleged falsity of the above answers, and that the evidence of what took place between the applicant and the agent at the time is admissible for the purpose of showing the facts which constitute the estoppel; also, that the provision in the application in relation to the limitation of the authority of the agent to waive any of the provisions of the contract, is in conflict with and controlled by the Revised Statutes, chapter 49, section 90.

²⁷² The questions arising upon these contentions are the principal matters in issue in this case.

1. It is undoubtedly the general and well-settled rule that a written contract which is signed by a party, and which contains the terms and conditions of the agreement, is conclusive upon

him, and he will not be permitted to show, for the purpose of avoiding such contract, that other stipulations were made at the time of, or before, its execution, which would vary, alter, or contradict the terms of the written agreement. This is a cardinal rule in the construction of contracts admitted to be valid, and where the true intent and meaning is to be ascertained. It has no application, however, where the existence or validity of the contract itself is in question: *Prentiss v. Russ*, 16 Me. 30; *Trambly v. Ricard*, 130 Mass. 259.

But, in the case of life insurance policies, it is the doctrine of many modern decisions that where the application is drawn by the authorized agent of the insurer, and the answers to the interrogations contained therein are written by him in filling the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument between the parties thereto. This doctrine has received the sanction of many of the highest courts in this country, in numerous decided cases, among which may be mentioned those by the supreme court of the United States: *Insurance Co. v. Wilkinson*, 13 Wall. 222, which was afterwards followed by *Insurance Co. v. Mahone*, 21 Wall. 152; *New Jersey etc. Ins. Co. v. Baker*, 94 U. S. 610; *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304.

It is established by the great weight of authority in a large majority of the courts of the several states. It is unnecessary to call attention to the decisions in every state where this question has been decided. The following are some of those which adopt the rule as laid down in the supreme court of the United States: *Plumb v. Cattaraugus etc. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Baker v. Home Life Ins. Co.*, 64 N. Y. 648; *Maher v. ²⁷³ Hibernia Ins. Co.*, 67 N. Y. 283; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Miller v. Phoenix etc. Ins. Co.*, 107 N. Y. 292; *Patten v. Merchants' etc. Ins. Co.*, 40 N. H. 375; *McGurk v. Metropolitan etc. Ins. Co.*, 56 Conn. 528; *Susquehanna etc. Ins. Co. v. Cusick*, 109 Pa. St. 157.

Massachusetts and New Jersey hold a contrary doctrine, on the ground that the evidence, if introduced, would tend to vary or contradict a written contract: *McCoy v. Metropolitan etc. Ins. Co.*, 133 Mass. 82; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Franklin etc. Ins. Co. v. Martin*, 40 N. J. L. 568; 29 Am. Rep. 271. This precise question has not arisen before in this state.

In the case before us, is the insurance company estopped to dispute its liability upon the policy? It cannot be unless the evidence of the acts and declarations of the agent are admissible, for without that evidence there would be nothing upon which to found such estoppel.

The answer to this question depends upon whether this court is to adopt the doctrine laid down by the supreme court of the United States, in the decisions to which we have referred, and also what we believe to be the great weight of authority in other courts of the several states, or the doctrine adhered to in Massachusetts and New Jersey. It is true that, by the terms of the application and certificate, the questions and answers of the applicant are made the basis of the contract. They are, nevertheless, the proposals upon which the contract is to be issued, and furnish the information upon which the company acts in determining whether it will enter into any contract or not. There can be no doubt that fraud or false representations, made as an inducement to a contract, may be shown for the purpose of avoiding the contract by the party upon whom such fraud has been practiced. A written instrument may be shown to be void by parol evidence. It may be attacked and overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the contract. And where the fraud and false representations are made with the knowledge and upon the advice or instruction of the party seeking to take advantage thereof, he would be estopped from setting up his own fraud as ²⁷⁴ contrary to good faith, and parol evidence of such fraud would be admissible to establish the estoppel.

This rule is equally applicable to insurance contracts as to any other, and it has been so held in many adjudicated cases. The ground upon which such evidence is admitted is, not that it does not tend to vary the terms of the written contract by parol, but that the recitals in the application are not, when viewed in the light of the evidence offered, the representations of the applicant, but the statements of the insurer himself. Wherever the courts have held facts to constitute an estoppel which precluded an insurance company from taking advantage of the alleged false answers, it has been assumed or expressly held that evidence was admissible, showing what these facts were. As was said by the court in *New Jersey etc. Ins. Co. v. Baker*, 94 U. S. 610: "The evidence objected to was admissible to show that the statement was not that of the applicant, although signed by her. The statement

was one prepared by the company, for which it was responsible, and it cannot be set up to defeat its policy."

And again in *North American etc. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638, Judge Cooley, in speaking of this question, says: "Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he himself had drafted these recitals, and was morally responsible for their truthfulness. . . . And we think the estoppel is precisely the same when the agent of the insurer drafts the papers as it would be in the case of an individual insurer who was himself personally present and acting."

In New Hampshire the same principle was applied in *Patten v. Merchants etc. Ins. Co.*, 40 N. H. 375, 380, where the court say: "Nor was it to contradict the fact that the plaintiffs had thus falsely answered the question, nor was it to explain that answer in any way, but merely to show that whatever the answer may have been, however incorrect in its statement of facts, yet that the agent of the company who drew the application and wrote down this answer of the plaintiffs upon that application, at the same time that he did so, knew perfectly well that the answer was incorrect, and had full ²⁷⁵ knowledge of the existence of the encumbrances whose existence that answer denied. It is the introduction of a new and independent fact, not for the purpose of contradicting or explaining the answer, but to show that whatever the answer may have been, the defendants had not been, and could not have been, misled or injured by it."

In the case at bar, had the agent who wrote out the answers in the application been the insurer and acting for himself in thus taking and filling the application, certainly the court would refuse to allow him to repudiate the advice and instructions given by him to the applicant in reference to the answers given, and to set up their alleged falsity in defense to an action against him on the policy. He would be estopped from so doing upon the doctrine before stated. He had the facts and circumstances fully made known to him by the applicant himself, and if bound by his own acts and instructions when acting personally, the company which he represents would be equally bound by his acts, instructions, and knowledge when acting as its agent: *Insurance Co. v. Mahone*, 21 Wall. 152, 156. Moreover, the statute (Rev. Stats., c. 49, sec. 90) provides that "such agents, and the agents of all domestic companies, shall be regarded in the place of the

company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk, and of all matters connected therewith. Omissions and misdescriptions known to the agents shall be regarded as known by the company, and waived by it as if noted in the policy."

This statute applies to domestic life insurance companies as well as to fire insurance. The legislature so intended. The remark of the judge who drew the opinion in *Johnson v. Maine etc. Ins. Co.*, 83 Me. 182, upon page 188, that "there is no such statute affecting life insurance contracts," evidently had reference to another section of the statute (section 20) in regard to fire insurance, which provides that certain representations or statements in the application must be shown to be, in fact, material before they shall be held to avoid the contract. It was not intended to go to the extent of saying that this section under consideration had no application ²⁷⁶ to life insurance contracts. We have held that it does, in *Mailhoit v. Metropolitan etc. Ins. Co.*, 87 Me. 374, 382; 47 Am. St. Rep. 336.

Of what avail would this statute be if the agent's knowledge could not be shown? And how can it be except by just such evidence as was introduced in this case? If this evidence were to be excluded, the agent's knowledge could never be shown. When it is shown, however, it binds the company, rendering the contract valid, and estopping the company from setting up the alleged false answers to defeat a suit upon it: *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304, 311; *Mailhoit v. Metropolitan etc. Ins. Co.*, 87 Me. 374, 382; 47 Am. St. Rep. 336.

In the case last cited, the false answer set up in defense was in reference to whether the applicant had other insurance on his life. He was insured in co-operative societies and so informed the agent, who advised him that such insurance was not within the meaning of the question, and to answer it, "No other." The court held that the attempted interpretation of the question by the agent was binding upon the company, and that the evidence was admissible to show the facts.

The defense cites the case of *Coombs v. Charter Oak etc. Ins. Co.*, 65 Me., 382, claiming that that is an authority directly against the position which the plaintiff is contending for in this case. In that case, the policy provided that in case the premiums were not paid on or before the days mentioned for the payment thereof, it should be void. The second premium was not paid when due, and the plaintiff offered to prove that at the time the

policy was negotiated the agent assured him that he might pay down what money he had, and "that he would wait for the balance any time within a year." This evidence was held inadmissible upon the ground that it tended to vary the terms of the written contract. But we think that case is to be distinguished from the case at bar. In that case, the provision in relation to the time of payment of the premiums was one of the express terms of the contract, as much as was the amount of the insurance, the party insured, or to whom it was payable. They constituted the essential elements of a completed contract, and, of course, could not be varied by parol.²⁷⁷ But the questions and answers in the application in this case, while they form the "basis of the contract," are really propositions for a contract, or proposals upon which it is to be issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which is received in the other bears upon entirely distinct propositions. In the former, it was excluded because it tended to vary a written contract by parol; in the latter, it becomes admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the company which had full knowledge of all the facts and which is estopped from controverting the truth of these statements.

2. The defendant also contends that the knowledge of its agent of the facts in reference to the declination of the Ancient Order of United Workmen to admit him to membership did not create an estoppel because of the applicant's agreement in his application that "statements made to an agent not herein written shall form no part of the contract to be issued hereon."

It is claimed that by virtue of this stipulation the case comes within the principle of *New York etc. Ins. Co. v. Fletcher*, 117 U. S. 519, in which it was held that the company was not estopped by the knowledge of an agent whose authority was limited by a provision in the application that no statements made, or information given to the person soliciting the application, should be binding on the company or in any way affect its rights.

Whatever might have been the effect of such an agreement, aside from any statutory provision governing the same, it is enough to say that we deem it in conflict with that provision of statute to which we have alluded. While the statute does not, in express terms, prohibit the insertion of such provisions, thereby declaring the same null and void, it expressly declares that the

agents of insurance companies shall be regarded in the place of the company in all respects regarding any insurance effected by them, and that the company is bound by their knowledge of the risk and all matters connected therewith, and that omissions and misdescriptions ²⁷⁸ known to them shall be regarded as known by the company and waived by it as if noted in the policy.

In this respect the present case differs essentially from that of *New York etc. Ins. Co. v. Fletcher*, 117 U. S. 519, for no such statute was referred to there; and it is more like the case of *Continental etc. Ins. Co. v. Chamberlain*, 132 U. S. 304, where a somewhat similar statute in Iowa was considered, and which was held to govern the rights of the parties.

Nor is the case of *Johnson v. Maine etc. Ins. Co.*, 83 Me. 182, in conflict with the principles herein stated. In that case, the court held that where, in a contract of insurance, the parties stipulate that certain statements are material, the court could not, in the absence of any controlling statute, decide that they are immaterial. In the present case, the parties attempt to agree to that which is controlled by statute, and thereby nullify its plain spirit and meaning.

If the effect of the provision in the application is to limit the authority of the agent to such an extent that his acts and knowledge in respect to the risk are not binding on the company, then certainly it is in direct conflict with the statute, which expressly provides that the agent "shall be regarded in the place of the company in all respects," and that it shall be bound by his "knowledge of the risk and of all matters connected therewith," and that "omissions and misdescriptions known" to him "shall be regarded as known by the company, and waived by it as if noted in the policy."

The statute must be held to be paramount to any agreement or stipulation which is in conflict with its terms. It is imperative and must control. It does not render void the contract of insurance which contains provisions at variance with its requirements. Its effect is to render null and void such provisions and stipulations, leaving the contract in all other respects in full force. Parties must be held to have contracted with a knowledge of it and subject to it. The legislature have deemed it wise to enact the law, and parties will be held to its observance, notwithstanding it may nullify stipulations which they see fit to insert in their ²⁷⁹ contracts contrary to its mandates: *Emery v. Piscataqua etc. Ins. Co.*, 52 Me. 322; *De Lancey v. Insurance Co.*, 52 N. H. 581,

589, 590; Continental Ins. Co. v. Chamberlain, 132 U. S. 304; Mailhoit v. Metropolitan etc. Ins. Co., 87 Me. 374, 382; 47 Am. St. Rep. 336.

3. The remaining objections relate wholly to questions of fact, and will be considered briefly. Among the questions in the application asked of the applicant, concerning his family history, and answers thereto, are the following:

"Father, age at death." A. "52."

"Cause of death. Duration of illness." A. "Not actually known. No physician. Had complaint of stomach for two years or more."

"Mother, age at death." A. "52."

"Cause of death. Duration of illness." A. "Chronic bronchitis; sick four or five years."

"Own brother, age at death?" A. "62 or 63."

"Cause of death. Duration of illness?" A. "Died in Illinois, Short sickness, with great pain in stomach."

The defendant insists that the answers given in relation to the cause of death of the father and brother are false, and were known to the applicant to be so at the time they were given.

1. The evidence bearing upon the answer, given in reference to the father's death, consists of the copy of applicant's previous applications to two other societies, and the testimony of a brother of the applicant. In these applications it appears that the answers given as the cause of the father's death was "heart disease," and as to its duration—"don't know; died suddenly, at last."

In the application to the defendant, claimed to be inconsistent with the former statements, the answer was: "Not actually known. No physician. Had complaint of stomach for two years or more." The testimony of the brother was, that his father died forty-four years ago, suddenly in the night, that there was no physician called before or after his death, and that he never knew whether his father died of apoplexy, paralysis, or heart disease. The ²⁸⁰ applicant was but fourteen years old at the time of his father's death. The statements in the former application were made five and seven years respectively prior to his application to the defendant, and are only inconsistent with his answer therein so far as it may be inferred from them that the applicant actually knew the cause of his father's death. At most they are only conflicting statements. The presumption is, that he answered truthfully, and fraud cannot be reasonably inferred from such evidence.

2. Again, as to the cause of his brother's death, his answer was, that he "died in Illinois. Short sickness, with great pain in his stomach."

As contradictory to this statement, the defense introduced the application to the Ancient Order of United Workmen, in which his answer as to the cause of his brother's death is given as "angina pectoris," and as to the duration of his illness as "short, only a few hours."

The fact is, that in the application to defendant the question calling for an answer as to the cause of death is not answered at all. If the defendant had desired a fuller statement it could have called for it. It did not, but accepted the application with questions partially answered, and issued the policy upon it, thereby waiving the imperfection in the answer, and rendering the omission to answer more fully, immaterial: *Phoenix etc. Ins. Co. v. Raddin*, 120 U. S. 183; *Connecticut etc. Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's etc. Ins. Co.*, 6 Gray, 185.

The alleged falsity of these answers was an affirmative proposition set up by the defendant to defeat a recovery upon the policy. The burden was on the defense to sustain this proposition, and this it has failed to do.

Judgment for plaintiff.

INSURANCE — APPLICATION — COMPANY LIABLE FOR FALSE ANSWERS OF AGENT.—If the agent of an insurance company makes, or fills in, false answers in an application for insurance, without the knowledge or consent of the insured, the company cannot avoid payment of a loss on account thereof: *Kansas etc. Ins. Co. v. Saindon*, 52 Kan. 486; 39 Am. St. Rep. 356, and note. See note to *Mailholt v. Metropolitan Life Ins. Co.*, 87 Me. 874; 47 Am. St. Rep. 844.

INSURANCE—EVIDENCE—FALSE ANSWERS.—Parol evidence is admissible to show that answers written by an insurance agent in an application which had been first signed in blank were incorrectly written by the agent, and were not the true answers made by the assured: *Brown v. Metropolitan etc. Ins. Co.*, 65 Mich. 806; 8 Am. St. Rep. 894. Parol evidence is admissible to show the truthfulness of statements made in the application: *Swift v. Massachusetts etc. Ins. Co.*, 63 N. Y. 196; 20 Am. Rep. 522; *Asbury Ins. Co. v. Warren*, 66 Me. 523; 22 Am. Rep. 590.

INSURANCE—STATUTES PARAMOUNT TO STIPULATION: See *Griffith v. New York Life Ins. Co.*, 101 Cal. 627; 40 Am. St. Rep. 96.

INSURANCE—APPLICATIONS — PARTIAL ANSWERS, EFFECT OF.—Entire omission to answer a question in a written application does not avoid the policy: *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; 36 Am. Rep. 676; *Rawls v. American etc. Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280.

EVIDENCE, TO VARY WRITING.—The illegality of a written instrument may be shown by parol evidence: *Roe v. Kiser*, 62 Ark. 92; 54 Am. St. Rep. 288, and note.

ATKINS v. FIELD.

[89 MAINE, 281.]

MASTER AND SERVANT—FELLOW-SERVANT—LIABILITY OF.—If, in setting up an apparatus, a fellow-servant does not exercise his own judgment or discretion, but simply follows the directions of a higher authority, he is not liable to a coemployee for deficiency in material or arrangement.

MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY OF FOR NEGLIGENCE.—If a servant personally selects the material and mode of setting up an apparatus furnished by the master, the former is liable to his fellow-servants for injuries caused by his negligence in performing the work, although it is satisfactory to, and approved by, the master.

MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY.—Subsequent or even contemporaneous approval by the master of work directed and controlled by the servant may free the latter from all liability to the former, but cannot free him from liability to his fellow-servants for his negligence.

APPELLATE PRACTICE.—EXCEPTIONS ON APPEAL must be specific, pointed and explicit; and, if indefinite, cannot be considered.

APPELLATE PRACTICE.—A verdict cannot be set aside as against evidence when the evidence is conflicting, unless the conclusion of the jury is clearly wrong.

WITNESSES—ABSENCE OF AS GROUND FOR A NEW TRIAL.—The refusal of a court to grant a continuance or postponement of the trial to enable a party to procure the testimony of a witness is not ground for a new trial, especially if such party has not exercised due diligence to obtain such testimony, prior to the trial.

A. W. Bradbury and G. F. McQuillan, for the appellant.

B. Thompson, for the appellee.

284 EMERY, J. From the plaintiff's evidence, the admissions in the defendant's evidence, and from the rulings of the presiding justice, it may be safely inferred that the jury, in finding for the plaintiff, found a state of facts as favorable for the plaintiff, as the following:

In the summer of 1894, the United States government was constructing a two gun battery at Portland Head through Lieutenant Colonel Hains of the Engineer Corps of the United States Army, supervising officer in charge. The plaintiff Atkins, the defendant Field, and numerous other civilians were employed by the government on this work—the plaintiff as a laborer, the defendant as immediate and general overseer. In the prosecution of the work, it was necessary to set up and operate a large derrick, and to change its location from time to time. Such a derrick was purchased by the government and delivered on the ground at the battery. The defendant Field, in the line of his

employment as overseer, personally assumed charge of the work of rigging and setting it up. He personally selected from the government stores the wire rope for the guys and gave directions to put only four guys on the derrick, though there were places for five guys. He also personally selected second-hand ^{2 1/2} inch and a quarter or inch and a half iron rods, and handed them to the blacksmiths, with directions to make them into a certain form of bolts or pieces with which to fasten the guys to the rock or ledge. He personally selected the places for thus anchoring the guys, and personally directed the mode of the drilling the holes, the insertion of the bolts, and the connection with the guys. It did not appear that there was among the government stores on hand at that place wire rope sufficient for more than four guys, or iron rods of greater size or strength than those used; nor did it appear that the defendant made any application for more wire rope or larger and better iron. The usual course of business was for the defendant, as overseer, to apply to the engineer officer in charge for any material needed, and for the latter to furnish it through purchase or requisition.

In doing this work about the derrick, the defendant acted upon his own judgment in the first instance, though he called the attention of the engineer officer in charge to what he was doing, and what material he was using, and obtained his ratification. It did not appear, however, that this supervising officer ever gave the defendant Field any specific directions about this particular work or material other than to express his content with what had been or was being done.

In June, 1894, after the derrick has thus been set up and used for some time, the defendant, as overseer, undertook to change the location of the mast. This involved the slackening and retightening of the guys, their anchorage not being changed. After the mast had been shifted, three of the guys had been retightened, and while a crew of men were retightening the fourth or southern guy by means of a tackle and fall at its anchorage, the iron rod or bolt at the foot of the northern guy, nearly but not quite opposite, suddenly broke, either from direct tension, or oblique break, and the derrick as suddenly fell. The plaintiff was at work at the time near the foot of the mast under the direction of the defendant, and, without fault on his part, was injured by the falling mast.

Neither the plaintiff nor any of the workmen were in the employ of the defendant, nor in any way his servants. They were

all, ²⁸⁶ including the defendant, in the common employment of the government, through the government officer in charge.

The plaintiff alleged in his declaration that the defendant in setting up and moving the derrick was guilty of negligence in two respects: 1. That he did not use a sufficient number of guys; 2. That he did not use suitable pins or bolts suitably arranged to hold the guys and support the derrick. No other fault was alleged. The complaint was wholly of insufficient material and arrangement. The jury were plainly instructed that before they could determine the question of negligence in either respect, they must be satisfied that the defendant directly and personally, and not through other employes of the government, fixed the number of the guys and the quality, size, and arrangement of the pins or bolts. The jury, therefore, in finding for the plaintiff must be assumed to have found that there was negligence in one or the other of these respects, and that it was the negligence of the defendant.

The defendant contended at the trial that he was not responsible for any result of the negligence or misconduct of any of the workmen in setting up or moving the derrick, nor for the fall of the derrick, if it resulted in any way from such negligence or misconduct of the other workmen, they not being his servants. This contention was practically sustained by the presiding justice, and the case submitted to the jury upon the question of insufficiency in guys, and bolts, and fastenings, and of the defendant's direct personal control over them. This circumstance eliminates all other questions from our consideration of the exceptions.

The defendant now upon his exceptions contends that even upon the foregoing finding of facts he is not responsible for the insufficiency in the number of guys, nor for the insufficiency in the quality, size, and arrangement of the bolts in fastening the guys to the ledge. The question of his responsibility for either of these deficiencies is the only question legitimately raised by his several exceptions.

His argument is, that he was only a coservant with the plaintiff under a common master, the United States government, and ²⁸⁷ both taking orders from a common superior, Lieutenant Colonel Hains; that the duty of furnishing safe machinery and appliances was upon the government, the common employer acting through its alter ego, the officer in charge; that all that he, the defendant, did, in setting up and staying the derrick was done as an employé under the supervision of and with the approval of

that officer; and that this approval by his superior relieves him from any responsibility therefor to his fellow-servants. He concedes that in operating the derrick, and even in changing its location, he was bound to be careful and diligent in his own conduct even toward fellow-servants. His claim for exception from liability is confined to the rigging and setting up the derrick, this being where he was held liable by the jury under the ruling of the court below. This work he contends was the duty of the common master, and hence was not his act, but the act of that master for which he is not responsible.

For the purposes of this opinion, it may be conceded that, if in rigging and setting up the derrick, the defendant did not exercise his own judgment or discretion but simply followed the directions of a higher authority, he would not be responsible for any deficiency in material or arrangement. Responsibility arises only where there is freedom of action. It appears, however, that the defendant was practically untrammelled in this work. He selected the material. He omitted to ask for more or better materials. He personally determined the number of guys, and the quality, size, and arrangement of the moorings of the guys. Colonel Hains, the officer in charge, did little if any more than acquiesce in the defendant's opinion and action. Representing the government, he was content so far as the government was concerned. He appears to have denied nothing, to have required nothing. Such subsequent or even contemporaneous approval by superior authority may free the actor from all liability to that authority, but cannot free him from liability to other persons. The driver of a carriage may drive hurriedly through a crowded street with the full approval of his employer, but will, nevertheless, be responsible to all persons injured by his recklessness.

²⁸⁸ The plaintiff, as directed by the defendant, was at work near the derrick within range of injury from its possible fall. In the absence of notice to the contrary, he could rightfully assume that whoever had rigged and set up the derrick had done so with proper material and in a careful manner. He was injured without fault of his, by the fall of the derrick, directly resulting from some lack of due care either in the material used, or in its arrangement. His injury, therefore, is directly attributable to whoever selected and arranged that material. The jury have found that the defendant was that person. His responsibility to the plaintiff follows logically and legally.

The defendant calls our attention to a distinction made in some cases between the misfeasance and mere nonfeasance of a person in the situation of the defendant. Such a distinction cannot avail here. If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance.

The legal result thus arrived at has seemed to us so easily deducible from familiar general principles, that authorities need not be cited. We cite one case only for illustration. In *Cameron v. Nystrom*, L. R. (1893) App. Cas. 308, the defendant was a stevedore employed in discharging a vessel; the ship furnished the gear, but the stevedore set it up; this was done so negligently that a part of the gear broke, letting fall a coil of wire upon the plaintiff, a seaman of the same ship, to his injury. It was argued that the plaintiff and defendant were coservants under a common master, the owner or master of the ship; and that as the defendant did not furnish the gear, he was not responsible for its breaking. The court held this to be no defense, and held that the defendant was responsible to the plaintiff for the negligence in setting up the gear.

Assuming our conclusions above stated to be correct, it is evident that all the requested instructions were properly refused.

~~and~~ The bill of exceptions further states that the defendant excepted "to so much of the judge's charge as related to the liability of the defendant for the equipment and construction of the said derrick, and the iron eyebolt connected therewith"; neither the words nor the substance of the ruling complained of is stated. We are not bound to consider such an exception. It is too comprehensive and indefinite. Such exception in a bill of exceptions should be specific, pointed, and explicit, showing specifically and precisely what ruling is claimed to be error: *McKown v. Powers*, 86 Me. 291; *Hamlin v. Treat*, 87 Me. 310. It may be said, however, that the presiding justice upon that part of the case ruled in accordance with this opinion.

As to the motion to set aside the verdict as against evidence, we find the testimony conflicting as usual in such cases, but we do not find such a preponderance in favor of the defendant as

constrains us to believe the jury were clearly wrong. The evidence for the plaintiff, if true, amply sustains all the propositions he was bound to prove, and we are not satisfied that it is untrue.

The damages seem to us large, but some of the evidence tends to show that the plaintiff, a young man, was badly and perhaps permanently injured. We hesitatingly conclude that the jury may not have erred.

As to the motion to set aside the verdict to let in the evidence of Lieutenant Colonel Hains, it is clear that the evidence is not newly-discovered. It was well known to the defendant when the action was first brought. He later endeavored to procure it, but did not obtain it in season for the day set for the trial. He then properly asked the presiding justice for a continuance or postponement until he could obtain the evidence. This question of further delay was for the presiding justice to decide in the exercise of a sound judicial discretion. The law court will not revise his action unless it appears that he has clearly abused his discretionary power. The action was entered at the February term, 1895, of the superior court, and the writ was served at least fourteen days before that time. The location of Lieutenant Colonel Hains, he being then stationed on Staten Island, New York Harbor, was well known to ²⁹⁰ the defendant, or at least easily ascertainable. The defendant, however, did not file his interrogatories until the fourth day of the following May, although he was bound to assume that the plaintiff would press for trial at the May term.

The plaintiff did not impede or delay the defendant in any way, but filed his cross-interrogatories on the next secular day and agreed upon a commissioner nominated by the defendant. The presiding justice granted one postponement of the trial for nearly a week, but refused to delay the plaintiff further. We cannot say that, under these circumstances, he abused his discretionary power in the premises. We think he exercised it properly. Litigants with trials in prospect must look early after their witnesses and documents. *Vigilantibus non dormientibus jura subveniunt.*

Motions and exceptions overruled.

MASTER AND SERVANT—SELECTION AND APPLICATION OF MATERIALS BY SERVANT.—If a workman, whose duty it is to select material for his use from a stock furnished by his employer or a vice-principal, through haste, carelessness, or mistake in judgment, selects unsuitable and unsafe material, while suitable and safe material is in the stock furnished, or if, being suitable when

selected, it is so attached to machinery by him as to render it unsafe, and either he or his fellow-servant is, from either of these causes, injured, the party injured has no cause of action against his employer or the vice-principal: *Prescott v. Ball Engine Co.*, 176 Pa. St. 459; 53 Am. St. Rep. 683, and note. If a master delegates to an agent the duty or authority of furnishing proper appliances and machinery for a business in which the servant is engaged, or of keeping such machinery and appliances in repair, and of making proper tests and inspection thereof, he is answerable to his servants and employes for injuries received by them from the negligence of the agent to whom these duties have been delegated: *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 400; 51 Am. St. Rep. 604.

SERVANT'S LIABILITY TO FELLOW-SERVANT FOR NEGLIGENCE: See extended note to *Albro v. Jaquith*, 4 Gray, 99; 64 Am. Dec. 58-60.

APPELLATE PRACTICE.—EXCEPTIONS, to be entitled to consideration on appeal, must point out the error or errors complained of with particularity, and not in general terms: *Benavides v. State*, 31 Tex. Crim. Rep. 173; 37 Am. St. Rep. 799, and note.

APPELLATE PRACTICE—CONFLICTING EVIDENCE.—Where the evidence upon the trial of an issue of fact is conflicting, the decision of the trial court thereon will not be disturbed by the supreme court, if it believes it to be warranted by the testimony: *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541, and note.

TRIAL—MOTION FOR CONTINUANCE—DENIAL OF NOT ERROR, WHEN.—It is not error to deny a motion for a continuance in a criminal case, where counsel has been assigned to defendant only two days before trial, and he, on the day preceding trial, files an affidavit for a continuance, stating that he has not had sufficient time in which to prepare for trial, and setting forth the testimony of an absent witness, whose testimony he desires, where the state consents that such affidavit may be read as the deposition of the absent witness: *State v. Stickney*, 53 Kan. 308; 42 Am. St. Rep. 284. When a continuance is asked for the purpose of obtaining testimony which could not avail the party asking it, its refusal works no injury, and is not error: *Herman v. Gunter*, 83 Tex. 66; 29 Am. St. Rep. 632.

LAFONTAIN v. HAYHURST.

[89 MAINE, 388.]

ASSUMPSIT—SERVICES RENDERED UNDER PROMISE OF MARRIAGE.—A person who renders services to another under promise and in expectation of marriage with the latter, but without expectation of compensation in money or money's worth, cannot, upon the breach of the promise, recover the value of such services in assumpsit. The only remedy, if any, is an action for the breach of the contract to marry.

CONTRACT—PROMISE TO PAY FOR PERSONAL SERVICES.—No binding promise to make compensation for personal services can be implied or inferred in favor of one person against another, unless the party furnishing the services then expected, or had reason to expect, such compensation from the other party.

MARRIAGE OR PROMISE OF MARRIAGE MAY BE A GOOD CONSIDERATION for a conveyance or contract only when the conveyance or contract is made in consideration of the marriage or promise of marriage.

E. F. Webb and L. T. Carleton, for the appellant.

S. S. Brown, for the appellee.

⁸⁹¹ EMERY, J. No binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected and from the language or conduct of the other party under the circumstances had reason to expect such compensation from the other party.

In this case, the plaintiff alleged a promise to make her compensation in money for the various services she rendered to the defendant. She testified, however, that she did not at the time expect any compensation in money or money's worth—that she was engaged to be married to the defendant and rendered the various services to him solely in consequence of that relation and of that expectation of marriage. The defendant afterward married another woman, and the plaintiff now claims that the defendant, having repudiated the promise of marriage, must now be held to have promised a money compensation for her services. She cites the case of *Cook v. Bates*, 88 Me. 455.

In *Cook v. Bates*, 88 Me. 455, the plaintiff furnished board to the defendant without expecting money payment, but with the expectation that it would offset the labor furnished by the defendant to her for the same time. The defendant sued for his labor, and obtained judgment by default through some mistake. Thereupon the plaintiff sued for the board, and it was held that a promise to pay for the board could be inferred. The plaintiff expected compensation not in money, but in money's worth, in the defendant's labor. The defendant, in suing for his labor, indicated an intention to pay for the board in money, and the plaintiff accepted this election. The defendant could not then be heard to say that his labor was to pay for the board.

⁸⁹² Marriage, or a promise of marriage, may be a good consideration for a conveyance or a contract when it appears that the conveyance or contract was made in consideration of the marriage or promise of marriage. In the case at bar, however, the plaintiff's services were not rendered as a consideration for the defendant's promise of marriage. That promise had been made before the rendering of the services, and upon another and different consideration—the promise of the plaintiff to marry the defendant.

The only contract between them was the mutual promise to marry. If the defendant has broken that contract, her remedy

is by an action upon that contract for that breach. The services sued for here were no part of that contract, but merely incidents or consequences of it. The plaintiff expected no pay for them. Her expectation was confined to the promised marriage. With that she would have been satisfied. With damages for its loss she must be satisfied.

Exceptions overruled.

CONTRACT—SERVICES DEEMED GRATUITOUS: See note to *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 306, 307.

SERVICES AND EXPENDITURES—ACTION FOR.—The law will not imply a promise of payment for services rendered under circumstances indicating that they were intended not to be paid for: *Estate of Kessler*, 87 Wis. 660; 41 Am. St. Rep. 80. A man living with a woman in the relation of husband and wife, whether legally married to her or not, does not have a right of action against the woman for the value of shelter, food, and clothing given her during the continuance of that relation, unless by virtue of some express agreement, as such relation implies a free interchange of support and service: *Payne's Appeal*, 65 Conn. 397; 48 Am. St. Rep. 215, and note.

LEWISTON v. GAGNE.

[89 MAINE, 395.]

OFFICIAL BONDS—LIABILITY OF SURETIES.—One who signs an official bond as surety at the request of the principal, thereby, qua the obligee, gives him implied authority to procure additional sureties to make the bond satisfactory to the obligee, and it makes no difference when the additional sureties are obtained. The assurance of the principal that certain persons are to sign the bond, who do not, does not release a surety who signs the bond.

OFFICIAL BONDS—LIABILITY OF SURETIES.—NOTICE BY SURETIES OF A CLAIM TO BE RELIEVED from liability on an official bond by reason of the principal having procured an additional surety cannot have any effect subsequent to the approval of the bond.

OFFICIAL BONDS—ACCEPTANCE—LIABILITY OF SURETIES.—After a surety has signed an official bond and it has been accepted, nothing short of information, which, in the exercise of prudence, requires the withholding of official duties from the principal, can release the surety.

OFFICIAL BONDS.—MUTUAL MISTAKE between the parties to an official bond as to the time in which it shall be of effect and in force may be corrected in equity.

F. L. Noble and R. W. Crockett, for the plaintiff.

J. W. Mitchell, W. H. Newall, W. B. Skelton, D. J. McGillicuddy, W. H. White, S. M. Carter, J. G. Chabot, A. R. Savage, and H. W. Oaks, for the defendants.

397 HASKELL, J. Debt upon the bond of a collector of taxes. The declaration calls for the penal sum of the bond as

damages without suggesting that any condition whatever is contained in the bond. The action is against the principal and five sureties. The first four sureties plead non est factum. Under this plea they assert an assurance by the principal, at the time they signed the bond, that certain persons were to become sureties who did not do so. Failure to procure those persons as sureties could not affect the liability of the four sureties who did sign. They may have been deceived by their principal, but the obligee is innocent of the deception, and should not be affected thereby, otherwise it could not safely accept an apparently good bond when presented for approval: *State v. Peck*, 53 Me. 284.

By brief statement, the four sureties also say that they signed the bond "on or about the second day of June, 1893," and that it was on that day "approved and accepted" and "placed in the files of the papers of the city of Lewiston," the obligee. This statement makes it the valid bond of the principal and these four sureties. These sureties further plead that thereafterward the obligee procured the fifth surety, thereby altering the bond in a material particular and destroying its validity. The evidence does not fully support these averments. The record of the meeting of the board of mayor and aldermen, June 2d, reads: "Bond of J. E. Gagne accepted and approved. . . . Voted to adjourn to June 14, at 7:30 P. M." At that meeting: "The matter of requiring extra bonds of the tax collector referred to Messrs. Barker and Provost." In pursuance of this vote, it is to be inferred that the collector was called upon to furnish another surety, for that surety testifies:

398 "Q. How came you to sign the bond? A. Gagne asked me if I was going to sign the bond. I told him I would see who was on, and see what I would do. The next morning he came to me, and said, Will you sign the bond? I said, I will see; he said, The bond is down to Reny's. I said, I will go down and see; he says, Provost and Auger are going to sign the bond. I said, Provost is going to be on there? He says, Yes; and Auger? he says, Yes. I went down there and went to the store. L'Heureux and I had some conversation together; then he presented the bond; L'Heureux says, Will you sign the bond? I said, I don't think I will; he says, Why? Said I, I want a few more names on. He says, Provost is going to sign. After he told me that Provost was going to sign, Well, says I, if Provost signs, I will sign. I did sign it.

"Q. You declined to sign until you were assured by Mr.

L'Heureux that Mr. Provost was going to sign? A. Yes, sir.

"Q. Was that the inducement that made you sign the bond?

A. Yes, sir.

"Q. His assurance? A. Yes, sir."

From this evidence it appears that the collector applied to the surety to sign his bond, and assured him that certain other persons were also to sign who did not, and told him that the bond was at Reny's store, and the surety said he would go down and see. One of the aldermen, other than those to whom the matter had been referred, produced the bond, and after assuring him that the other persons named by the collector were going to sign, and upon the strength of that assurance he signed it. This representation originally was made by the collector, and as the bond could not properly be intrusted to strangers, the aldermen who had the matter in charge for the city undoubtedly intrusted it to one of their associates as the collector's friend to enable him to procure the additional surety. To compass this result, the bond was produced by the alderman to whom it had been loaned, not as an agent of the city, but as a friend of the collector; and any representations ³⁹⁹ of the collector repeated by this alderman were in no sense representations of the city. They were representations of the collector only, and therefore the fact pleaded, that the city procured the fifth surety, is not proved; so that the question is whether the procurement of an additional surety by the collector himself releases the four sureties who had already signed the bond.

One who signs an official bond as surety at the request of the principal thereby, qua the obligee, gives him implied authority to procure additional sureties to make the bond satisfactory to the obligee. That is the only practical way to procure an official bond, and it makes no difference when the additional sureties are obtained. If the bond be approved by the obligee, and before the principal enters upon the duties of his office, at the request of the obligee, the principal procures additional sureties, the act comes within the implied authority given when the existing sureties executed the bond on their part. The proceedings would be wholly for their benefit, and not change the obligation between the obligor and obligee in the slightest particular, and upon no principle of law can it be said to destroy the bond. The defense of the four sureties, that a fifth had been added after the bond had once been approved and before the principal entered upon the duties of his office, must fail. Nor, after the approval of the

bond and before the commitment of taxes, can notice by these sureties of their claim to be relieved by reason of procuring a fifth surety have any effect. They had become legally bound for the official conduct of the collector. Nothing short of information that would require the city government, in the exercise of proper prudence, to withhold the commitment of taxes from the collector could relieve them from liability on their bond. It is not pretended that any such information was furnished, nor that any facts existed that would warrant such action by the city. This defense, therefore, must fail.

The fifth surety defends upon the ground of being induced to sign by reason of the assurance that certain other persons were also to sign. As before shown, this defense cannot prevail, inasmuch as it was not the inducement of the obligee.

All the sureties plead that the bond contained a condition for ⁴⁰⁰ the faithful performance of official duty for the municipal year "ensuing the month of March, 1894," and that the principal has performed the same. All the parties agree that the bond was intended for the municipal year "ensuing" the month of March, 1893, and supposed that it was so conditioned. It is a clear case of mutual mistake which equity corrects. This case is on report with a stipulation that, if damages are recoverable, they may be assessed below as upon motion to chancer the penalty of the bond.

We are satisfied that the bond is the valid deed of all the defendants and that the plaintiff should recover damages. To this end a default should be entered, in order that, on process in equity, the bond may be corrected, unless the parties may so agree, after which appropriate damages may be assessed.

Defendants defaulted. Damages to be assessed below.

OFFICIAL BONDS—LIABILITY OF SURETIES—SIGNING ON CONDITION THAT OTHERS SIGN.—The sureties on an official bond, by the act of giving their principal the possession and control of the bond, after they have affixed their signatures thereto, constitute him their agent for the purpose of delivering it to the proper authorities, and if someone has to suffer because he has exceeded his powers, as by delivering the bond without procuring the signature of a person who, it was understood, was to be one of the obligors, the loss must fall on the sureties who have thus declared by their acts that he could be relied upon to carry out their intentions, unless it is shown that the obligee has notice, either actual or constructive, that the conditions under which he obtained possession of the bond have not been complied with: *King County v. Ferry*, 5 Wash. 536; 34 Am. St. Rep. 880. Where a public officer procured the signatures of sureties on his official bond on the assurance that he would procure certain others, which he failed to do, the signers

cannot evade liability if the obligee had no notice of the condition and the bond was complete in form: Carrol County v. Ruggles, 69 Iowa, 269; 58 Am. Rep. 223; Nash v. Fugate, 32 Gratt. 595; 34 Am. Rep. 780; Cutler v. Roberts, 7 Neb. 4; 29 Am. Rep. 371, and note. But where the defendant signed an injunction bond as surety, and delivered it to the principal on condition that it was not to be delivered to the obligee unless certain others also signed it as sureties, and the principal delivered it in violation of that condition, it was held that the defendant was not liable: Guild v. Thomas, 54 Ala. 414; 25 Am. Rep. 703, and extended note.

MAXCY MANUFACTURING COMPANY v. BURNHAM.

[89 MAINE, 533.]

AGENCY.—AN UNKNOWN PRINCIPAL MAY, UPON DISCOVERY, be held for the acts of his agent within the scope of the authority of the latter.

AGENCY—HUSBAND AND WIFE.—A wife is liable for material which goes into her dwelling-house, when such material is sold and delivered to the husband upon his credit under the belief that he is the owner of the house, and it subsequently appears that he was acting merely as the agent of his wife.

AGENCY—HUSBAND AND WIFE.—If a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the erection or repair of buildings upon her land, a jury is justified in finding that the husband acted as the agent of his wife.

AGENCY—HUSBAND AND WIFE.—If a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the repair of buildings upon her land, she cannot repudiate that particular act performed for her benefit within the scope of that authority or management, simply on the ground that, in that instance, the act of her agent was not in harmony with her private opinion or wishes, especially when her objections are not made known to the party furnishing the lumber.

AGENCY—REVOCATION.—Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency, unless notified of such revocation. This rule applies when a husband is acting as agent for his wife.

E. O. and F. E. Beane, for the appellant.

G. W. Heselton, for the appellee.

539 WHITEHOUSE, J. The plaintiff corporation obtained a verdict against the defendant for the price of certain lumber alleged to have been furnished upon the order of her husband and used in finishing and repairing the dwelling-house owned by her and occupied by her and her husband, and the defendant brings the case to this court on exceptions and motion for a new trial.

It satisfactorily appears from the evidence that all of the lum-

ber ⁵⁴⁰ and materials comprised in the account annexed to the writ, with the exception of a portion of the flooring described in the first item, were used, with the knowledge of the defendant, for the improvement of her property; but it is contended in her behalf that she was not the contracting party and had no responsibility for the payment of the debt.

Neither the plaintiff corporation, nor any of its servants had any knowledge at the time of the delivery of the lumber, nor for several years thereafter, that the defendant had title to the house in which it was to be used. The items were all charged to the defendant's husband, and were undoubtedly sold on his credit upon the assumption that he was the owner of the estate. But it is confidently urged in behalf of the plaintiff that the evidence was ample to warrant the jury in finding that the defendant's husband, in making the purchase of this lumber, was authorized to act, and did act, as the agent of his wife, and although this fact was not disclosed by him at the time, the plaintiff, on discovering the agency, could rightfully proceed, as it did, directly against the defendant as principal.

In her direct examination, the defendant stated, it is true, that she never authorized or directed her husband to "purchase any of the goods charged in this bill"; that on one occasion he wanted to get some material to lay the floors, and she told him they owed enough, she would "put no more money into it; she didn't wish to run in debt any more." But on cross-examination she testified inter alia, as follows: "I bought the land on which the house sits. The house is in my name. . . . We live together there on the premises and have since the house was built. My husband had the entire management of getting the lumber to build the house and the materials that were put into the house; he superintended the construction of the house. . . . I never forbid him from getting lumber to put into the house. . . . He generally got what he wanted and put into the house; he consulted me about some things. Some things that he got we talked over and some we did not."

It also appears in evidence that, some three years prior to the transaction in question, another bill of lumber was purchased of the ⁵⁴¹ plaintiff by the defendant's husband, paid for by him, and used in the construction of the same dwelling-house. The defendant admitted that she never gave notice to the plaintiff, or anyone else, not to sell her husband lumber to go into the house.

What facts shall be deemed sufficient evidence of a husband's agency under such circumstances is a question that has frequently been considered by this court. In *Verrill v. Parker*, 65 Me. 578, it is tersely stated by the court that the wife was liable "because the labor was done upon her property and for her benefit and expended before her eyes." In the recent case of *Roberts v. Hartford*, 86 Me. 460, the general principle is clearly stated as follows: "When a husband has the general management of his wife's property and with her knowledge orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that the husband acted as her agent." And in conclusion it is further said: "On the whole, it is the opinion of the court that it is best in all such cases to leave the question of agency to the jury; that in most cases, they will be likely to decide truthfully as well as equitably."

In the case before us, the question of agency was fairly submitted to the jury under instructions which were in substantial accordance with the principle laid down in the cases cited.

The counsel for the defendant, however, specially complains of the instruction that the defendant might be liable notwithstanding the objections she may have made to her husband respecting certain improvements, provided her objections were not made known to the plaintiff. But if the defendant had allowed her husband to exercise general authority in the management and control of her property and the purchase of lumber for the erection of the house, it is an elementary principle of agency that she could not repudiate a particular act performed for her benefit within the scope of that authority, simply because, in that instance, the conduct of her agent was not in harmony with her private opinion or wishes. Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation ⁵⁴² of his agency, unless notified of such revocation: *Wharton's Agency*, sec. 3, and cases cited.

Again, there was testimony tending strongly to show that a large part of the flooring, charged in the first item of the account, was never used in the defendant's house, but was sold by the husband to another party; and the defendant insists that in no event could the jury have been authorized to find the defendant liable for the part thus sold.

But it was in evidence, and not controverted, that the items of credit came from the separate property of the defendant's husband; and as these items would be legally appropriated to extin-

guish the earliest items on the debit side of the account, the disposition of the lumber obtained under the first item became immaterial.

The evidence was sufficient to authorize the verdict, and there seems to be no valid reason for disturbing it.

Motion and exceptions overruled.

AGENCY—LIABILITY OF UNDISCLOSED PRINCIPAL.—Where one contracts as agent without naming his principal, who is unknown, the contract inures to the benefit of the principal, if ratified by him, and both are bound thereby: *Waddill v. Sebre*, 88 Va. 1012; 29 Am. St. Rep. 766. Where one is conducting a separate business in his own name, but with the property of an undisclosed principal, the latter is bound, and cannot escape liability by some secret limitation on the authority of the former: *Hubbard v. Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585, and note; *Eastern R. R. Co. v. Benedict*, 5 Gray, 561; 66 Am. Dec. 389.

AGENCY—HUSBAND AGENT FOR WIFE.—Where a wife assents to a contract made by her husband for materials to be used in the erection of a building on her separate estate, and knowingly receives them and assents to their application to her property, she is bound by such contract: *Bodey v. Thackara*, 143 Pa. St. 171; 24 Am. St. Rep. 526. The husband of a married woman may be by her constituted her agent for the management of her separate estate, and if he, being such agent, purchases articles for her or for her separate estate, or supplies for her tenants thereon, she is liable therefor: *Brown v. Thompson*, 31 S. C. 436; 17 Am. St. Rep. 40. Finding that husband acted as duly authorized agent of wife, in employing person to perform labor upon the wife's house, is justified, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband had general management of the property, that he employed the petitioner to perform the work, that the wife knew he was working on the house, and that she personally gave him directions as to part of the work: *Wheaton v. Trimble*, 145 Mass. 345; 1 Am. St. Rep. 463, and note. Wife may appoint her husband as agent with respect to her separate estate: *Third Nat. Bank v. Guenther*, 123 N. Y. 568; 20 Am. St. Rep. 780, and note.

AGENCY—REVOCATION—THIRD PARTIES NOT AFFECTED UNTIL NOTICE OF.—Implied authority of agent arising from general employment continues after the agency has in reality ceased, as far as concerns parties who have given credit before, and still continue to give credit to it, and who have not actually been notified of the change, and cannot be presumed to have had notice of the change: *Tier v. Lampson*, 35 Vt. 179; 82 Am. Dec. 634, and note; *Van Dusen v. Star Quartz Min. Co.*, 86 Cal. 571; 95 Am. Dec. 209; *Diveray v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154.

EMERY, APPELLANT.

[89 MAINE, 544.]

JUDGMENTS PENDING INSOLVENCY PROCEEDINGS.
If, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment so far as to defeat any claim for an allowance under it against the insolvent estate; and the judgment is not provable against the estate of the debtor because it did not exist at the time of the initiation of the insolvency proceedings.

JUDGMENTS PENDING BANKRUPTCY PROCEEDINGS.
A discharge in bankruptcy is a bar to a judgment entered after the commencement of the bankruptcy proceedings, upon a claim provable in such proceedings.

A. Simmons, for the appellants.

S. J. & L. L. Walton, for the appellees.

544 FOSTER, J. The appellants, on December 6, 1889, brought suit in this court on a claim due them from Leonard H. Walker, who was afterward, on March 18, 1890, adjudged insolvent on petition of his creditors by the insolvent court of Somerset county.

The appellants proved their claim in the insolvency court, April 8, 1890, in accordance with section 25, chapter 70 of the Revised Statutes. Walker's discharge was denied in the insolvency court, Sept. 12, 1891. Judgment was rendered in the original suit in this court at the September term, 1892, and execution issued thereon for the full amount of the appellants' claim.

In July 1895, before any dividend was declared, the creditors of Walker filed objections to the claim of the appellants in the 545 insolvency court, on the ground that the appellants had recovered judgment on this claim in the supreme judicial court subsequent to the commencement of insolvency proceedings. Those objections were sustained, and an appeal taken to this court.

We think the objections were properly sustained, and the ruling of the court below correct. It was in accordance with a series of decisions by which it has been held that if, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment, so far as to defeat any claim for an allowance under it against an insolvent estate, and the judgment is not provable against the estate of the debtor, because it did not exist at the time of the initiation of insolvency proceed-

ings: *Sampson v. Clark*, 2 Cush. 173; *Bradford v. Rice*, 102 Mass. 472; 3 Am. Rep. 483; *Wyman v. Fabens*, 111 Mass. 77, 80; and if recovered after the first publication of notice of issuing the warrant it will defeat the proof of the original debt: *Sampson v. Clark*, 2 Cush. 173; *Wyman v. Fabens*, 111 Mass. 77. And the original claim ceased to be provable, because it was extinguished by the judgment, so far as to defeat any claim for allowance under it.

The creditor, by proceeding to take judgment, has changed the form of his debt and secured the benefit of conclusive evidence of it, as well as an extension of the period of limitation thereon, and is thereby held to have elected to abandon his right to prove the claim against the estate, and to look to the debtor personally for the collection of his judgment.

It must be borne in mind that this claim was one that arose after the enactment of the insolvent law, and therefore the reasoning applied in *Ross v. Tozier*, 78 Me. 312, and *Wilson v. Bunker*, 78 Me. 313, in reference to impairing the obligation of contract, has no application here, for in those cases the contracts were in existence at the time of the passage of the insolvent law.

Nor do we go further than to hold the doctrine herein enunciated applicable to insolvency proceedings under the insolvent law of this state, and not to proceedings under the bankruptcy law of ⁵⁴⁶ the United States. A different rule might be held to apply in such case, and for constitutional reasons, as stated in *Boydton v. Ball*, 121 U. S. 457, where the supreme court of the United States has decided that a debt provable in bankruptcy, although merged in a judgment entered up after the commencement of bankruptcy proceedings, still remains the same debt on which the action was brought, and that such a judgment is discharged by the debtor's discharge in bankruptcy. And the very recent case of *Huntington v. Saunders*, 166 Mass. 92, is to the same effect, holding that a discharge in bankruptcy is a bar to a judgment entered after the commencement of the bankruptcy proceedings, upon a claim provable in such proceedings and thereby modifying the previous decisions in that state so far as they differ from it in respect to the effect of discharges in bankruptcy.

In the case at bar no discharge was ever obtained in the insolvent court. The appellants having presented their claims in the insolvent court, it became subject to the jurisdiction of that court, and the evidence of indebtedness should not have been with-

drawn to form the basis of a judgment in the other court until the amount of the dividend had been ascertained, paid, and indorsed thereon. The action in the supreme court could have been continued for judgment until the dividend had been declared and paid. But by withdrawing the evidence of indebtedness, or taking judgment upon the same in full in the supreme court, after commencement of proceedings in insolvency (*Sampson v. Clark*, 2 Cush. 173), the claim was merged in that judgment, and thereby the appellants must be held to have waived their rights in the insolvent court, and cannot have judgment in both courts, for the reasons hereinbefore stated.

Appeal dismissed with costs.

BANKRUPTCY.—JUDGMENTS OBTAINED PENDING PROCEEDINGS in bankruptcy upon a debt provable therein is barred by the subsequent discharge of the judgment debtor in such bankrupt proceedings: *Lochmer v. Stewart*, 91 Tenn. 385; 30 Am. St. Rep. 887, and note. In an action on a judgment obtained in New Hampshire, after defendant had been adjudged a bankrupt, on a debt provable in bankruptcy, a certificate of his subsequent discharge in bankruptcy is no bar to the action in Massachusetts, there being no evidence of a different law and practice in New Hampshire: *Bradford v. Rice*, 102 Mass. 472; 8 Am. Rep. 483.

JUDGMENTS AGAINST INSOLVENTS: See note to *Wells v. Atkins*, 68 Vt. 191; 54 Am. St. Rep. 882.

EMBDEN v. LISHERNESS.

[89 MAINE, 578.]

JUDGMENTS AS ESTOPPEL.—A judgment, to be conclusive as an estoppel, must have been rendered upon the merits of the case, and the same subject matter.

RES JUDICATA.—IF SEVERAL ISSUES ARE PRESENTED BY THE PLEADINGS, and the record fails to show upon which in fact the judgment was rendered, it is competent to show that fact by evidence allunde, not to contradict the record, but in support of it.

JUDGMENTS—EVIDENCE.—If the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence.

E. N. Merrill and G. W. Gower, for the plaintiff.

A. Simmons, for the defendant.

578 FOSTER, J. Action of debt brought under section 175, chapter 6, of the Revised Statutes, to recover two hundred and seven dollars, the amount of tax assessed upon defendant's real estate for the year 1889.

It is admitted that the tax was legally assessed and has never

been paid; that at the December term of this court for the county of Somerset, an action of debt was tried, in which Stillman A. Walker, collector of taxes for the plaintiff town, was plaintiff, and against this same defendant; that the suit was brought by the collector under section 141, chapter 6, of the Revised Statutes to recover the same tax. The plea in that action was the general issue. The jury returned a general verdict for the defendant.

In the present action, the plea is the general issue, with brief statement of the former judgment as a bar to the maintenance of this suit. The plaintiff in this action offered to prove by parol that the only issue upon which said former cause was tried was that of ⁵⁷⁹ "due notice and demand" given to and made upon the defendant by Walker as collector before the bringing of said former suit. This testimony was objected to by the defendant, and the only question before the court is upon the admissibility of this evidence. If admissible, judgment is to be rendered for the plaintiff.

We think it admissible. At the former trial at which the general issue was pleaded, it was competent for the defendant to show that no "due notice" had been given before the bringing of the suit, as required by the statute authorizing a collector of taxes to sue in his own name. This was the issue presented, and upon which the defendant prevailed. The merits of the case except as to the question of due notice, were not passed upon.

The gist of the present suit is, whether the defendant owes the tax for which he is sued. The only defense is, that the collector of taxes brought suit for the same at a former term, and in the trial the defendant prevailed. In that suit it was essential to show "due notice" as well as a legal tax. Failure to do either, and the verdict would be the same. Both allegations in the writ had to be established to make out a *prima facie* case. The record of that case is before us; but with the general issue alone pleaded, and with a general verdict of "does not owe," how are we enabled to tell upon which allegation the defendant succeeded? There is nothing as appears from the record to determine this question. Whether it was for want of due notice, or the want of a legal tax, can be shown only by evidence aliunde the record, and the point upon which the case turned must necessarily be proved, if proved at all, by such evidence. This is what the plaintiff in the present suit offered to prove.

A judgment, in order to be conclusive as an estoppel, must have been rendered upon the merits of the case, and the same subject matter: *Clark v. Young*, 1 Cranch, 181, 194; *Phelps v. Harris*, 101 U. S. 370; *Dunlap v. Glidden*, 34 Me. 517, 519; *Hill v. Morse*, 61 Me. 541; *Smith v. Brunswick*, 80 Me. 189; *Young v. Pritchard*, 75 Me. 513, 517; *Arnold v. Arnold*, 17 Pick. 4; *Cunningham v. Foster*, 49 Me. 68, 70.

⁵⁸⁰ It is well settled that where several issues are presented by the declaration and pleadings, and the record fails to show upon which in fact the judgment was rendered, it is competent to show the fact by evidence aliunde, not, however, to contradict the record, but in support of it: *Dunlap v. Glidden*, 34 Me. 517; *Jones v. Perkins*, 54 Me. 393, 396; *Rogers v. Libbey*, 35 Me. 200; *Chase v. Walker*, 26 Me. 555; *Cunningham v. Foster*, 49 Me. 68, and cases there cited. See, also, *Lander v. Arno*, 65 Me. 26; *Hood v. Hood*, 110 Mass. 463; *Blodgett v. Dow*, 81 Me. 197, 201. See, also, *Walker v. Chase*, 53 Me. 258, a leading case in this state where this doctrine is fully considered.

While the rule is strict that evidence aliunde cannot be introduced to contradict the record, it is a universally acknowledged rule that a judgment obtained upon the ground that an alleged demand is not yet due is no bar to an action subsequently brought on the same demand, after it has fallen due: *Freeman on Judgments*, secs. 268, 274.

A suit upon a bond before condition broken, in which the defendant prevails on that account, is no bar to an action brought against the same defendant after condition broken: *McFarlane v. Cushman*, 21 Wis. 401.

So where a suit is brought for several demands, some of which are due, and others of which are not due, and a general verdict is given for the plaintiff, it has been held that he may show in a second suit brought upon the demands not due in the trial in the first suit, that they were disallowed because not due: *Kane v. Fisher*, 2 Watts, 246; *Bull v. Hopkins*, 7 Johns. 22.

Thus in *Perkins v. Parker*, 10 Allen, 22, in a real action where a former judgment in bar was set up in defense, the court held that it was competent for the demandant to introduce parol evidence that there were two distinct grounds of defense relied upon, one of which involved only the question whether his grantor was seised, at the time of the making and delivery of the deed to him, and that this ground of defense was established by proof,

and that for this cause solely the judgment was rendered in favor of the ⁵⁸¹ defendant, and not by reason of any defect in the title of his grantor.

In the case of *Whiting v. Burger*, 78 Me. 287, 296, our court say: "When the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence." See, also, the case of *Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp.*, 164 Mass. 222, 226, 49 Am. St. Rep. 454, where the court hold that where there are several demands sued in one action and the plaintiff obtains a general verdict and judgment, the record of such judgment is not conclusive evidence that all of the demands were included therein, and will not bar a subsequent action for such as in fact were not adjudicated upon. The general tendency of decisions is in accord with this doctrine.

In the recent case of *De Sollar v. Hanscome*, 158 U. S. 216, the court say: "Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit": *Russell v. Place*, 94 U. S. 606.

This case comes within the rule laid down in the foregoing decisions. The evidence offered is not contradictory of the record in any way, but rather in aid of it, by showing what question was determined by the jury in finding their verdict. That question was one where want of due notice entitled the defendant to prevail. Had the suit been upon a note which was not due, and judgment had been given for the defendant because the suit was prematurely commenced, that fact undoubtedly could be shown by parol in a subsequent suit after the note had become due, and would constitute no bar to the second suit.

Judgment for plaintiff for two hundred and seven dollars and interest from date of writ.

JUDGMENTS AS ESTOPPEL.—In order to bar a second action, the circumstances of the first action must have been such that the plaintiff might have recovered for the same cause of action alleged in the second. An adjudication made on grounds purely technical, and where the merits could not come into question, is limited to the

point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first: *Converse v. Sickles*, 146 N. Y. 200; 48 Am. St. Rep. 790.

RES JUDICATA—EVIDENCE.—When the record does not settle the question, oral evidence is admissible to show what was in fact decided. If a judgment may have been based upon either of two or more issues presented in the pleadings, it is not conclusive upon either, unless evidence is received to show which issue was in fact determined as the ground of the former adjudication. Uncertainty as to what was in fact decided is fatal to the use of a judgment as an estoppel: *Fahey v. Esterley Machine Co.*, 8 N. Dak. 220; 44 Am. St. Rep. 554, and monographic note on Proof of Res Judicata, 562-572.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BETCHER v. HODGMAN.

[68 MINNESOTA, 80.]

INTEREST—RULE FOR COMPUTING—PARTIAL PAYMENTS.—The United States rule is adopted in Minnesota as the law for computing interest. Hence, when partial payments have been made, the rule for casting interest is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance.

Controversy over the method of computing interest. There was a judgment for the defendants, Hodgman and another, and the plaintiff, Betcher, appealed.

F. M. Wilson, for the appellant.

J. C. McClure, for the respondents.

80 BUCK, J. In this case, the only assignment of error is that the court erred as to the proper rule for computing interest. The defendant Hodgman is the owner of two judgments against plaintiff, as follows: One dated February 13, 1885, for \$8,196.30; and one for \$1,275.15, dated October 9, 1885. On November 7, 1885, Hodgman and the plaintiff entered into a written contract under seal, wherein a reference to these judgments was made; and it was therein agreed that if Hodgman would cause no executions to be issued upon either of said judgments at any time prior

to November 1, 1886, Betcher would pay interest on each of said judgments from their respective dates until paid, at the rate of ten per cent per annum. Hodgman waited until February 24, 1892, when he caused executions ³¹ to be issued upon each judgment, and delivered the same to the defendant Anderson, who was the sheriff of Goodhue county. In the mean time, Betcher paid to Hodgman upon said judgments various sums, and the plaintiff claimed that the amount due thereon was only the sum of \$1,420, while the defendant Hodgman claimed that there was due at the time of serving his answer the sum of \$1,852.75, with interest from February 24, 1892, at the rate of ten per cent per annum.

The controversy is over the method of computing interest. The trial court found the amount due the defendant Hodgman was \$2,223.32. The action was brought to restrain the defendants from collecting the executions for the amount claimed to be due Hodgman. The rule adopted by the trial court is that generally known as the "United States Rule," and adopted by the federal courts, by which the interest is computed up to the time of the payment; and, if the payment exceeds the amount of interest due then add the interest to the principal, and deduct the payment. There was no error in this method of computation, and it has been substantially adopted by the courts of a large number of the different states. This rule is, however, more fully stated in the opinion of Chancellor Kent in the case of *Connecticut v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471, and is as follows: "The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal; and interest is to be computed on the balance, as aforesaid." This is the correct rule, and we adopt it as the law for computing interest in this state. This is not compounding interest, but the payments are applied to reduce the interest already due, and the surplus does not augment the principal.

The judgment is, therefore, affirmed.

INTEREST—RULE FOR COMPUTING—PARTIAL PAYMENTS. The United States rule, for computing interest in case of partial payments, is the one recognized in most of the states: *Wallace v. Glasser*, 82 Mich. 190; 21 Am. St. Rep. 556.

BOWLER v. BRAUN.

[43 MINNESOTA, 22.]

NEGOTIABLE INSTRUMENTS—SECOND INDORSERS—WHO ARE.—If a person not connected with the original consideration of a note indorses it after a prior indorsement by the payee, and below the signature of such payee, the law conclusively presumes it to have been done in aid of the negotiation of the note, and the party thereby becomes a second indorser.

NEGOTIABLE INSTRUMENTS—SECOND INDORSEMENT—PAROL EVIDENCE TO VARY.—It is not competent, as between a second indorser and a subsequent holder of the note, to vary the legal effect of the second indorsement by parol evidence, whether the holder is an innocent purchaser or not.

Action on a promissory note, brought by the plaintiff, Samuel Bowler, against Julius Braun, Mathilda Braun, John Niemann, and Fritz Niemann. There was a judgment for the plaintiff, and the defendant, Fritz Niemann, appealed.

Southworth & Collier, for the appellant.

F. C. Irwin, for the respondent.

³² **BUCK, J.** On November 14, 1893, the plaintiff, a banker, having in his hands, for collection, a note belonging to the defendant John Niemann, collected it by receiving the interest due and a new note for the principal, of five hundred and fifty dollars, from the makers, Julius Braun and Mathilda Braun, payable to John Niemann, the same payee. The next day after the collection was made, the new note and the interest paid, less plaintiff's charges, were delivered to the payee, John Niemann, and by him taken to his home, and kept there for five or six days, when he and his son, Fritz Niemann, also one of these defendants, returned to the bank, and the new note was purchased by the plaintiff from the payee, John Niemann. At the time the note was brought to the bank, and during the negotiations for its sale, there were no indorsements upon it. The plaintiff, however, during such negotiations, and before he bought the note, told John Niemann and Fritz Niemann ³³ that he would not buy it unless they would both indorse it. This was said to them on the day when the new note and interest were delivered. They would not then indorse it, but they returned in five or six days,

when the plaintiff repeated the offer to buy the note if they would indorse it, giving as a reason for his refusal to otherwise buy it that he had understood that John Niemann had signed all of his property over to his son, Fritz Niemann. They both finally agreed to indorse the note if the plaintiff would discount it, and, before the money was paid over, both signed the note upon the back thereof; and, as John Niemann could not write his name, Fritz Niemann signed it for him, and he made his mark upon the back of the note, and below the signature the defendant Fritz Niemann signed his own name. Upon the money being paid, they delivered the note to the plaintiff so indorsed, with the signature thereon of one E. E. Chard, as a witness to the signature of John Niemann.

The note, with the signatures thereon, is as follows:

"550.00. Belle Plaine, Minnesota, Nov. 14, 1893.

"On April 14, 1894 (without grace) after date we promise to pay to the order of John Niemann, five hundred and fifty dollars with interest at the rate of ten per cent per annum until paid and it being the intention that this note, if not paid at maturity, shall bear the same rate of interest thereafter as before, until paid.

"No. ———. Due ———. Value received.

"JULIUS BRAUN.

"MATHILDA BRAUN."

His

Indorsed on back of note: "JOHN X NIEMANN.

Mark

"Witness: E. E. CHARD.

"FRITZ NIEMANN."

Both of the Niemanns claim that Fritz Niemann wrote his name across the back of the note at the cashier's request, as a witness to his father's signature. This was denied by the plaintiff, and the jury, by their verdict, found against the defendant. It is claimed by the plaintiff that Fritz Niemann was a second indorser, and that he ³⁴ signed for the purpose of procuring credit for the makers of the note, and thereby having the plaintiff discount it. This was denied by the appellant, Fritz Niemann.

There was no plea that Fritz Niemann signed as a guarantor, or that his signing was void, under the statute of frauds, for want of an express consideration; but, as this was not objected to, we will treat the question of his being a guarantor or indorser as

one at issue between the parties, although the principal contention arising upon the evidence was whether Fritz Niemann signed the note as a witness.

An indorsement is said by the law books to be the writing of one's name upon the instrument, with intent to render liable the party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such failure is duly notified to the indorser: 1 Daniel on Negotiable Instruments, sec. 666. If the indorser is the payee of commercial paper, and it is indorsed in the usual form, parol testimony is inadmissible to make his liability other than that of an indorser: Coon v. Pruden, 25 Minn. 105. In such cases, there is no ambiguity or uncertainty, because the law defines the character in which the party signs, and there is nothing to explain. The apparent meaning and legal effect of the signature is indicated by its place upon the note. Whatever parol evidence may have been introduced upon the trial bearing upon the question of Fritz Niemann's being an indorser or guarantor did not change the legal effect of his indorsement, and its admission does not seem to be complained of as error by either party. The plaintiff could not do so consistently, for he had a verdict, and that verdict must be held conclusive upon the question of the intent with which Fritz Niemann signed his name, so far as it is based upon any parol testimony. Except as to Fritz Niemann's signing as a witness, the plaintiff was entitled, as a matter of law, to recover upon the note in question, assuming that Fritz Niemann wrote his name upon the back of the note not as a witness, but below the payee's name, for the purpose of having it discounted by the plaintiff.

Whatever may be the holding of courts in other jurisdictions, we are of the opinion, and so hold, that where a person not connected with the original consideration of a note indorses it after a prior indorsement by the payee, and below the signature of such payee, the law ⁸⁵ conclusively presumes it to have been done in aid of the negotiation of the note, and the party thereby becomes a second indorser, and that it is not competent to vary the legal effect of that indorsement by parol evidence as between such indorsers and a subsequent holder of the note, whether the latter is an innocent purchaser or not. In this case, his name appears on the note as a second indorser, and not a guarantor. His undertaking was not a collateral, but a direct, one, and made in the usual form of indorsements. He was entitled to the protection

which the rule of the law merchant guarantees to all such signers, viz., that he should be promptly notified that the primary debtor had dishonored the instrument. This was the course pursued in the case before us.

That he intended to bind himself in some shape is quite apparent, and there might be force in saying that, as he did not pledge his responsibility in the form of a guaranty, he did not so intend, and that, as he signed his name in the shape of a regular indorser, he intended thereby to make a new, substantial, and responsible contract. His signing was to give efficacy and strength to the note, and thereby aid in its being discounted by the plaintiff. The danger of allowing such regular indorsements to be varied by the uncertainties of parol evidence is well illustrated by this case, where this regular indorser testified that he did not sign in any other capacity than as a witness; and, foiled in this attempt, by the verdict of a jury, he now seeks to have himself regarded as a guarantor, and, because the consideration was not expressed in the guaranty, alleges that he is not bound at all. The safety of the commercial business of the country will be best subserved by preventing the dishonest, the selfish, and the forgetful from varying their written obligations by parol evidence in cases of this kind. We do not refer to the rule as between the payee and the indorser, or as to irregular indorsements, but between the second indorser and the party who discounted the note. The doctrine laid down by the court in *National Bank of Bellows Falls v. Dorset Marble Co.*, 61 Vt. 106, we consider the correct one, viz: "But in the case of regular indorsements, that is, indorsements in blank, of third persons, under the name of the payee, a different rule pretty generally prevails; and such indorsements are held to impose only the obligation of second indorsers; and parol evidence is not received to vary that obligation ³⁶ because it is said that there is no ambiguity arising from a regular indorsement in respect of the nature of the obligation intended to be assumed, as there is from an irregular indorsement, for on the face of the paper a regular indorser is liable as second indorser, and that it is no more competent to vary the legal effect of a written instrument by parol evidence than it is to vary its express terms." Certainly, such a rule is far better and safer than one which allows extrinsic parol evidence to vary the legal effect of what we also regard as the express terms of the instrument. We not only believe this to be sound law, but that it is in accordance with the general practice in commercial business, not only

in this, but in many other states; and to overturn this doctrine, we believe, would be disastrous, and full of peril. See, also, the following authorities: *Perry v. Friend*, 57 Ark. 437; *Pierce v. Mann*, 17 Pick. 244.

The order denying the motion for a new trial is affirmed.

NEGOTIABLE INSTRUMENTS—SECOND INDORSERS—PAROL EVIDENCE.—If several persons indorse a negotiable instrument, the legal effect is to subject them to each other in the order of their indorsement, the legal presumption being that the payee is the first indorser: *Temple v. Baker*, 125 Pa. St. 624; 11 Am. St. Rep. 926. The general rule is, an indorser's liability cannot be changed or varied by parol evidence: *Note to Hatley v. Pike*, 53 Am. St. Rep. 312.

GOULD v. GREAT NORTHERN RAILWAY COMPANY.

[63 MINNESOTA, 37.]

RAILROADS—FENCES—CONSTRUCTION OF STATUTE.—The words "on each side of such road" in a statute requiring a railroad to be fenced "on each side of such road" mean that the fence must be built on the margin or border of the entire railroad right of way, and, therefore, on the division line between such right of way and that of the adjoining proprietor.

RAILROADS—FAILURE TO FENCE—RIGHT TO JOIN FENCES—DAMAGES.—If a railroad company, having a mere easement in its right of way across farm lands, is required by statute to fence its road, an adjoining landowner may maintain an action for damages for its failure to fence. The primary duty of the company is to build its fence on the line, margin, or edge of its right of way, and it cannot, by building the fence inside of the line of its right of way, deprive such owner from joining his fences to those of the company. Hence, in such action, the landowner may show, as an element of damages, that he would have the legal right to join his fences with those of the company, whether built on or inside of such line, and that the failure of the company has deprived him of the benefit of such right.

Action for damages. There was a verdict for the plaintiff and the defendant appealed.

M. D. Grover and C. Wellington, for the appellant.

William C. Bicknell, for the respondent.

³⁷ BUCK, J. This action is brought to recover damages arising from the neglect of the defendant to fence its railroad as required by the General Statutes of 1894, section 2692.

The plaintiff owns two large adjacent stock farms in Stevens county; one containing six hundred and forty acres and the other three hundred and twenty acres. The defendant's road is constructed across each of these farms, for a distance of about two

miles, without being fenced as required by law. Each farm is used separately, and has its own buildings. The railroad runs nearly through the center of one farm, and divides the other so ^{as} as to leave a larger portion upon one side than upon the other. About one-half of these farms is suitable for raising stock, and the balance is well adapted to the raising of grain. The neglect of the railroad company to erect its fences on each side of its road is a plain violation of a positive law. The omission to erect these fences renders these farms, to some extent, less suitable for stock raising, and deprives the plaintiff from using them with such advantage and profit as he otherwise would. And this result would tend to impair its rental value, and make the farm less valuable: *Finch v. Chicago etc. Ry. Co.*, 46 Minn. 250. If the verdict in this case rests upon sufficient legal evidence as to the damages arising from the impaired rental value, and the depreciation in the value of the farm, in consequence of the defendant's neglect to fence its road, we cannot properly disturb the verdict.

There were only three witnesses, including the plaintiff, sworn in his behalf, and none on behalf of the defendant. The witness Brittondall testified as to the amount of damages to the premises by reason of the railroad's not being fenced, but added that he also based his opinion as to such damages upon the fact that the whole tract was not fenced on all sides. Of course, such evidence could not constitute the proper basis for estimating the legal measure of damages, as against the defendant, by reason of its neglect to fence its road. Whether there were fences or not on all of the other sides of the farm, except where the railroad was bound to fence, was immaterial, and could not properly be considered in adding to or lessening the damages to which the defendant was liable by reason of its neglect to fence its road as required by law. None of the evidence of this kind, however, was objected to, and therefore no question of error arises upon its admission. If there was no other testimony upon the subject, it would only show that the verdict of the jury is not sustained by the evidence. It is claimed by the defendant that the testimony of the witness Sanders is of the same character. There is considerable doubt about this being a fair construction of his evidence. It can be asserted with much force that his testimony related to the fence which the railroad company was bound to build, and not to fences upon other sides of the premises. But, whichever view of the testimony is correct, it is not necessarily

material in the determination ³⁹ of this case. The plaintiff did not so testify, but did testify as to the impaired rental value of the land by reason of there being no railroad fence there. His uncontradicted and unimpeached testimony was sufficient to sustain the verdict of the jury in this respect, unless his further explanation of the manner of estimating the rental value of the lands is of such a character as to nullify his previous testimony, and make it, as a whole, incompetent and insufficient as a basis for estimating proper damages. In estimating the difference in the rental value with and without the fences being there, he based it upon the ground that the fences would be on each side of the track, seventy-five feet from the center of the track, which would make the fence on the division line between the parties. He also testified as follows: I base my estimate of the rental value upon the proposition that I have a right to join my fence to that of the railroad company, built directly upon the line between my land and the railroad right of way, so that I can have the use of the railroad company's fence on one side.

The statute to which we have above referred (Gen. Stats. 1894, sec. 2692), in regard to railroad companies fencing their roads, reads as follows: "All railroad companies in this state shall, within six months from and after the passage of this act, build or cause to be built good and sufficient cattle-guards at all wagon-crossings, and good and substantial fences on each side of such road." Evidently, the witness based his opinion upon the assumption that it was the duty of the railroad company to build its fences on the margin or outer line of its right of way; that is, upon the division line between him and the railroad company. Is not this the true construction to be placed upon the language of the statute? In Webster's International Dictionary the word "side" is defined to be the "margin, edge, verge, or border of a surface; . . . a bounding line of a geometrical figure; as, the side of a field, of a square or triangle, of a river, of a road." This word "side" is not here used in a technical sense, but as it is commonly and properly understood. The meaning of the words "on each side of such road" is, that the fence must be built on the margin or border of the entire railroad right of way, and therefore on the division line between such right of way and that of the adjoining proprietor. This construction evidently gives full force to the spirit and intent of the language of the statute, as well as to the usual and popular meaning ⁴⁰ attached to the words. While the authorities are almost, if not quite, universal

that the primary object of the statute requiring railroads to fence their roads is one of a police nature, yet possibly it might have been the legislative intent that such a fence would also serve as a partition or division fence. Probably the railroad company could not, especially when it has only an easement in the right of way, be compelled to build a partition fence as such, yet it may constitute one; and we think that the adjoining landowner should share the right to join fences with the fence of the railroad company, whether such a fence is denominated simply a "railroad fence," or a "partition fence," which incloses upon one side the land of the adjoining owner, and as a matter of legal right such owner would have the benefit of it as a partition fence.

This was the view taken of the statute of Illinois which required the railroad company to erect and maintain fences on both sides of its road: *People v. Ohio etc. Ry. Co.*, 21 Ill. App. 23. And it was there held that the words "on both sides of its road" meant the margin or border of the entire grounds used as a roadway. To the same effect are *Wabash etc. R. R. Co. v. Zeigler*, 108 Ill. 304, and *Ohio etc. Ry. Co. v. People*, 121 Ill. 483. In the latter case the court uses the following language: "The question now is, whether a railroad company, in complying with the statute in question, may build a fence required thereby anywhere on its right of way, except on the line between its right of way and the adjoining owner's land, or, what is the same thing, is the fence now constructed, after notice given, ten feet within and upon its right of way, and that distance from the adjoining owner's land, a compliance with the provisions of the statute in regard to fencing railroads? It is thought it is not. The statute is so plain in this regard, it seems idle to attempt to construe it. It makes it the duty of the company to erect a fence on 'both sides of the road'—that is, so as to embrace the right of way; and so this court has held in *Wabash etc. R. R. Co. v. Zeigler*, 108 Ill. 304. In that case it was decided a fence built two feet inside of the right of way was not constructed in conformity with the statute. The suggestion the 'sides of its road' may mean the mere 'track' upon which trains are moved is too absurd to be seriously considered": See, also, *Thornton on Railroad Fences*, sec. 135.

⁴¹ Of course, where there are such natural or physical formations of the ground as to make it difficult or impossible to comply with the statute, the company would not be liable for not fencing on the margin of its right of way. But where no such obstacles intervene, the railroad company is bound to build its fences on the

margin of its right of way, and the adjoining landowner has a right to connect his fences with its fences whenever he builds up to them. Even if it is not the object of the law to furnish the landowner with a partition fence on one side of his land, yet its provisions and requirements do embrace the protection of the cattle of the owner of a stock farm as well as the safety of travelers upon its railroad, or the lives of its employes.

But there is another ground upon which the order of the trial court should be sustained. There is a long line of cases, commencing with that of *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 392 (515), 88 Am. Dec. 100, holding, as the settled doctrine of this court, that when a railroad company, whether as a condition or limitation of its right to take land for its road, or as a police regulation, is required to fence its road, the damages for the taking the land should be assessed upon the basis of the construction of such fences by the railroad company. In this case we must assume, in the absence of any proof to the contrary, that the railway company has merely an easement in its right of way, and that the fee of the land, subject to the easement, remains in the plaintiff. If the railroad company had built a fence on the line of its right of way, the plaintiff would have been entitled to join his fences to it, so as to inclose his land, without having to build another and parallel fence on the same side of his land. Even if we should concede that the railway company is not bound to build its fence on the line of its right of way, it is clear that it cannot, by building it inside of the line, upon its right of way, deprive the landowner of the benefit of it as a line fence. If the company builds its fence inside of the margin or edge of its right of way, the landowner may extend his fences so as to connect with it. Having had his damages assessed upon the basis that it, and not the landowner, will build the fence between him and it, the railroad company cannot be heard to say that he cannot join his fences to its fence for the purpose of inclosing his land; and this right to thus connect his fence is an element which may be taken into account in estimating the value of the use ⁴² of the land. Hence the railroad company should do one of two things—build its fence on the line of its right of way, or, if it build on such right of way, inside the line, allow the adjoining landowner to join its fences to the railroad company's fence. If the railroad company desires an unobstructed use of its entire right of way, it can easily accomplish this purpose by building its fence on the margin thereof, and thus do away with the obligation to permit

the adjoining landowner to join fences with its fence. It cannot defeat the right of the adjoining landowner to have his fences connect with its fence by refusing to build a fence either on its line or inside of it, although, as we have stated, its primary duty is to build its fence on the margin of its right of way.

Therefore it seems to us that the plaintiff's testimony in regard to the grounds upon which he based his damages was substantially correct. It was the legal right of joining his fences with the defendant's, either on the exact line, or near to and inside of it, which he considered the primary element in estimating his damages, and the matter of expense in building a few feet of additional fence would be of too little consequence to seriously affect the amount of damages one way or the other, and certainly not to the disadvantage of the defendant's rights. It was therefore properly submitted to the jury, and, there being no evidence to the contrary, we should not disturb the verdict.

It is a matter of great importance that railroad companies fence their right of way, because it involves the safety of the lives of the traveling public, as well as the interests of the adjoining landowner; and, if they continually and obstinately persist in defying the plain provisions of a positive law, perhaps obedience to its requirements will be quickened and obtained by being mulcted in damages in favor of an injured landowner, the rental value of whose adjoining farm is thus impaired year after year.

There being no prejudicial errors in the case, the order denying the motion for a new trial is affirmed.

RAILROADS — FAILURE TO FENCE — LIABILITY.—In some cases, courts have construed statutes requiring railroad companies to erect and maintain fences "on the sides of their road," or "on each side of their railroad," when the same passes through inclosed lands, or lands improved, without discussing the main point decided in the principal case: See *Tracy v. Troy etc. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 54; *Norris v. Androscoggin R. R. Co.*, 39 Me. 273; 63 Am. Dec. 621; *Whitney v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 103. A failure to fence, as required by statute, renders railroad companies answerable in damages for injuries occasioned by such failure: *Norris v. Androscoggin R. R. Co.*, 39 Me. 273; 63 Am. Dec. 621; *Whitney v. Atlantic etc. R. R. Co.*, 44 Me. 362; 69 Am. Dec. 103; *Tracy v. Troy etc. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 54; note to *Memphis etc. R. R. Co. v. Kerr*, 20 Am. St. Rep. 162.

STATE v. SUTTON.

[63 MINNESOTA, 147.]

CONSTITUTIONS—CONSTRUCTION.—If there is no uncertainty or ambiguity in the words of a constitution, the apparent meaning must be given effect, and neither the legislature nor the courts have power to add to, or to take away from, that meaning.

CONSTITUTIONAL LAW—DISABILITY OF MEMBER OF LEGISLATURE TO HOLD OFFICE.—Under the provision of a state constitution, providing that no senator or representative shall, "during the time for which he is elected," hold any office under the authority of the United States, or of the state, except that of postmaster, the disability of a member of the legislature to hold office does not cease until the expiration of the full period of time for which he was elected, though he resigns during that time.

Quo warranto. Judgment of ouster.

H. W. Childs, attorney general, and George B. Edgerton, for the relator.

Davis, Kellogg & Severance, for the respondent.

148 BUCK, J. At the general state election held November 6, 1894, the respondent, John B. Sutton, was elected to the office of representative of the twenty-third legislative district for the term commencing on the first Monday of January, 1895, and ending on the first Monday of January, 1897. Pursuant to such election, he duly qualified and entered upon the discharge of his duties as such member at the commencement ¹⁴⁹ of the session for the year 1895, and in that capacity served until May 2d of that year, when he resigned his office as such member. The legislative session during which he served as a member terminated prior to his resignation. On May 4, 1895, Sutton was appointed to the public office of inspector of boilers for the fourth congressional district in this state, which office is one of great public importance and responsibility, it having been created by an act of the legislature prior to Sutton's election as a member thereof. Upon his appointment to the office of inspector of boilers, Sutton qualified and entered upon the performance of the duties of the office, and as such officer he has continued to and now occupies and holds said office, claiming the right so to do by virtue of his appointment. This proceeding is by a writ of quo warranto to oust and exclude the respondent, Sutton, from further acting as such inspector of boilers, upon the ground that he is prohibited by the constitution from holding such office until the expiration of the time for which he was elected as representative.

The clause relied upon by the attorney general to sustain his

contention is article 4, section 9, of the constitution, and reads as follows: "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States, or the state of Minnesota, except that of postmaster; and no senator or representative shall hold an office under the state which had been created or the emoluments of which had been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature."

In treating of constitutional provisions, we believe it is the general rule among courts to regard them as mandatory, and not to leave it to the will or pleasure of a legislature to obey or disregard them. Where the language of the constitution is plain, we are not permitted to indulge in speculation concerning its meaning, nor whether it is the embodiment of great wisdom. A constitution is intended to be framed in brief and precise language, and represents the will and wisdom of the constitutional convention, and that of the people who adopt it. It stands, not only as the will of the sovereign power, but as security for private rights, and as a barrier against legislative invasion. It has been well said that "the constitution, which underlies and sustains the social structure of the state, must be beyond being shaken or affected by unnecessary construction, or by ¹⁵⁰ the refinements of legal reasoning": *People v. Rathbone*, 145 N. Y. 434.

The rule with reference to constitutional construction is also well stated by Johnson, J., in the case of *Newell v. People*, 7 N. Y. 9, 97, as follows: "If . . . the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor legislature have the right to add to or take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of human writings—those which ordain the fundamental law of states—the rule rises to a very high degree of significance. It must be very plain—nay, absolutely certain—that the people did not intend what the language they have employed in its natural signification imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

In the case at bar, it is not necessary for us to speculate upon the intention of the framers of the constitution in adopting the provision in question. A bare reading of this provision suffices to enable us to ascertain and understand its meaning, and we need not search for light through the uncertainties of extraneous interpretation or construction. It is a part of the organic law of the state that no senator or representative shall, during the time for which he is elected, hold any office under the authority of the state of Minnesota. Is there any uncertainty or ambiguity about this language? Has it any of the characteristics which demand a construction to be placed upon it by the judiciary of this state, other than that which is transparent from the language itself?

The respondent, Sutton, became a representative of the legislature of the state of Minnesota on the first Monday in January, 1895, and the time for which he was elected continues until the first Monday in January, 1897. He was not merely prohibited from holding any office during the time which he might serve, but during the time for which he was elected. The difference is obvious, and the language too sweeping to be disregarded. The respondent could not nullify ¹⁵¹ the constitutional prohibitory clause, "during the time for which he is elected," by his resignation of the office of representative. The time for which he was elected was the entire constitutional term of two years, and, whether he resigned during that time or not, he was not permitted to hold any other office under the authority of this state during such entire term. Evidently, it was the intention of the framers of the constitution, by the language used, to prevent, so far as possible, trafficking in public offices, and, so far as appropriate language, with definite and well-understood meaning, is concerned, they did so. But this clause is absolute in its express terms that no member of the legislature, during the time for which he was elected, shall hold any other office under the authority of the state of Minnesota. Hence, whether a member holds an office either by trafficking for it, or by an appointment conferred upon him, without solicitation, and without bargaining for it, he still comes within the constitutional prohibition. It is not merely a question of whether he obtained the office in an honorable manner, but the prohibition is so far reaching as to prohibit it being held, no matter what the conditions are upon which it was obtained.

It is due to the respondent that we should say distinctly that there is nothing in the record whereby anything dishonorable

in obtaining this office can be imputed to him, or to the one appointing him. Undoubtedly, he is holding this office under an erroneous view of the meaning of the constitutional provision above referred to, but nevertheless against its express prohibition.

There are several other constitutional provisions bearing upon this question of holding office which we may, perhaps, examine with profit. A member of the legislature is forbidden to hold an office under the state the emoluments of which had been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature. There can be no serious question raised as to the right of a member of the legislature to resign his office; but, if he does so, it cannot enlarge his right to hold another office, in violation of this constitutional prohibition. The disability only ceases at the expiration of the full period of time for which he was elected.

This prohibition against holding other offices also applies to the judiciary. The constitution, article 6, section 11, provides that "the justices of the supreme ¹⁵² court and the district courts shall hold no office under the United States, nor any other office under this state. And all votes for either of them for any elective office under this constitution, except a judicial office, given by the legislature or the people, during their continuance in office, shall be void." As the judges have no legislative power, the rule applied to them is different, but not less rigid. Even a vote cast for them by the people or the legislature, for any office except a judicial one, is absolutely void; and bartering by them for other official positions would be utterly useless. But this prohibition as to votes for them only applies during their continuance in office. When their terms cease, the disability no longer exists, and during their terms, having no legislative power, the temptation to traffic in official positions is wanting; and, when their terms expire, they stand upon equal footing with other citizens, so far as concerns their right to hold office.

We are not unmindful of the fact that there is a long line of opinions given by the attorneys general of this state which are not in harmony with the views herein expressed upon the main question here involved, but, however able those opinions may be considered, yet when the act of the respondent in holding the office of inspector of boilers, under the circumstances, clearly contravenes an express power of the constitution, we feel it our imperative duty to so hold and determine; and, while there may

have been others holding offices under similar circumstances, one or more violations of a constitutional provision, we need hardly say, is no justification for any further violation of that instrument. Perhaps there is some apparent excuse and justification for the respondent's appointment and holding this office, in view of the opinions to which we have referred, and in view of the language used by the court in the case of *Barnum v. Gilman*, 27 Minn. 466; 38 Am. Rep. 304.

Great reliance is placed by the respondent's counsel upon this case to sustain his position, and there is language used which seems to justify the meaning which counsel claim for it; but in view of the fact that the syllabus in that case makes no reference to this constitutional question, but does expressly state another ground upon which the case was decided, and in view of the further fact that the language used in the opinion seems to place the decision substantially upon another ground, we must regard what was there said in reference to the constitutional provision here under consideration as obiter. There are other statements, however, in that opinion, which ¹⁵³ we regard as sound law, viz: "Ineligibility to hold an office, and ineligibility to an election to it, are not identical. One may be disqualified from holding an office at the time of his election thereto, and yet be eligible to an election to it; and if, before he is required to enter upon its duties, the disability is removed, he may, also take and hold it."

To illustrate this position, suppose a member of the house of representatives of the last legislature should, at the general election in the month of November, 1896, be elected to the office of governor of this state, his eligibility to the latter office could not be successfully challenged, because the time for which he was elected a member of the legislature would expire before the commencement of his official term as governor. In such case, it could not be said that he was holding another office during the time for which he was elected a member of the legislature. It is, therefore, the holding of another office, and not the election to it, which is prohibited during the time for which a member of the legislature was elected.

We are of the opinion that the respondent, in holding the office of inspector of boilers, as charged in the writ of quo warranto, comes within the prohibition of the constitution, article 4, section 9, and it is therefore adjudged that said respondent, John B. Sutton, is guilty of unlawfully holding and exercising the office of inspector of boilers for the fourth congressional district in

this state. And it is further ordered and adjudged that said John B. Sutton be ousted and excluded from said office of inspector of boilers, and that judgment be entered accordingly.

CONSTITUTIONS—CONSTRUCTION.—If the language of a constitution is plain and free from ambiguity, the court is not permitted to speculate further as to what the real intentions of the framers of such constitution may have been: *State v. Clarke*, 21 Nev. 333; 37 Am. St. Rep. 517.

CONSTITUTIONAL LAW—OFFICERS—DISABILITY FROM HOLDING TWO OFFICES—RESIGNATION.—The appointment of a member of the legislature to office, in violation of the constitutional provision, is void, both for want of capacity in the appointee to accept, and for want of authority in the appointing power to appoint: *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169. Where a person is holding a federal and a state office, made incompatible by state constitution, but, before answer and issue joined in quo warranto to oust him from the state office, he resigns and surrenders the federal office, his title to the state office is thereby perfected so that he cannot be ousted therefrom by judgment in the quo warranto proceeding: *De Turk v. Commonwealth*, 129 Pa. St. 151; 15 Am. St. Rep. 705.

FIDELITY & CASUALTY COMPANY OF NEW YORK v. EICKHOFF.

[63 MINNESOTA, 170.]

CORPORATIONS, FOREIGN—COMPLIANCE WITH OUR LAWS—PRESUMPTION.—In an action by a foreign corporation, termed a "guaranty insurance company," engaged in the business of guaranteeing to employers the fidelity of their employes, it will not be presumed that the company has not complied with the laws of this state, though the complaint fails to allege that the plaintiff has a license to do an insurance business in this state. That is a matter of defense.

INSURANCE, FIDELITY—PUBLIC POLICY.—A contract guaranteeing the honesty of employes is not void as being against public policy.

EVIDENCE—STIPULATIONS AS TO CONCLUSIVENESS OF—PUBLIC POLICY.—A stipulation in a contract between a guaranty insurance company and an employe of another, guaranteeing the honesty of the employe, that the voucher or other evidence of payment by the company to the employer shall be conclusive evidence as to the fact and extent of the employe's liability, is void as against public policy.

INSURANCE, FIDELITY—PLEADING.—If a guaranty insurance company is bound, by its contract, to make good, and to reimburse, an elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of an employe of the elevator company, an express and direct allegation, in a complaint of the insurance company against the employe to recover upon the latter's promise of indemnity, that the shortage was so caused is unnecessary where the facts alleged prove that, under the contract, the shortage was caused by the defendant's fraud or dishonesty.

INSURANCE, FIDELITY—RESPECTIVE OBLIGATIONS—EFFECT OF PROVISIONS AS TO PROOF OF LIABILITY.—A contract of guaranty having been executed at the request of an employé, in the form requested by him, and whereby a guaranty insurance company insures his employer against the employé's acts of fraud or dishonesty, the employé's obligation to indemnify the company is coextensive with that of the company to reimburse the employer; and any provisions in the contract, as to proof of liability, binding on the insurance company, in favor of the employer, are equally binding on the employé in an action brought by the insurance company against him to recover indemnity for what it has paid in his behalf.

INSURANCE, FIDELITY—WHEN COMPLAINT STATES CAUSE OF ACTION.—A complaint by a guaranty insurance company, against an elevator company's employé, to recover money alleged to have been paid to the elevator company on a bond, by which the plaintiff obligated itself to make good, and to reimburse, the elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant, states a cause of action, where it alleges a request for a bond on the part of defendant; the furnishing of such a bond to the employer and his acceptance thereof; a promise, either express or implied, to reimburse plaintiff on account of losses incurred by reason of such bond; a breach of the conditions of the bond; a claim upon plaintiff for payment of such loss under the bond; the payment by plaintiff to the employer of the loss occasioned by breach of the provisions of the bond; and the failure of the agent to reimburse the plaintiff for the amount so paid to the employer after demand so to do.

Van Fossen, Frost & Brown, for the appellant.

H. Steenerson, for the respondent.

¹⁷⁵ **MITCHELL, J.** The plaintiff, a foreign corporation, is what is termed a "guaranty insurance company," engaged in the business of guaranteeing to employers the fidelity of their employés. This action was brought to recover money alleged to have been paid to the Red River Elevator Company, defendant's employer, upon a bond by which the plaintiff obligated itself to make good, and reimburse to the elevator company, such pecuniary loss as it might sustain by reason of the infidelity of the defendant as its receiving agent in one of its grain elevators. ¹⁷⁶ The appeal is from an order sustaining a demurrer to the complaint on the ground that it did not state facts constituting a cause of action.

The material conditions of the bond, which is set out in the complaint, are as follows: "The company [the plaintiff] shall, . . . subject to the conditions and provisions herein contained, . . . make good, and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employés [of whom defendant was one] named upon said schedule or added thereto,

as hereinafter provided, in connection with his duties as receiving agent or buyer; provided, that the company shall be liable only for the acts of fraud or dishonesty on the part of the persons mentioned in the schedule, who act as receiving agents, for shortages in their grain accounts, as follows, viz: There shall be deducted from the total amount of grain and dockage received by the receiving agent at said elevator or elevators screenings and dirt from such grain as has been cleaned at said elevator or elevators, together with the amounts of shipments based upon weights of grain and dockage at terminals, and if the result shows a deficit, and the shortage is not caused by the various exceptions agreed to, this proof of loss will be accepted as binding on the part of the company. In case where screenings and dirt are burned at an elevator, they shall be weighed before being burned, and the weight reported daily to the employer; provided, that the company shall not be liable for the grading of grain, loss by heating, drying, or leakage of cars, or other damage, shortages caused by defective weighing apparatus or appliance, or for shortages in any elevator or elevators caused by the failure of any of the parties mentioned in said schedule to take dockage enough to make good their weights for grain checks issued, as the employer hereby assumes the risks of its superintendents, traveling men, and officers in giving instructions to its receiving agents as to the amount necessary to take to make good the amount of dockage at terminal points, and the action of receiving agents in taking dockage, the loss by cleaning grain, and the ordinary shrinkage arising from dust in handling of said grain in elevators. And it is further agreed that the company shall not be liable for errors or carelessness in weighing of grain, nor for thefts of grain by persons other than those covered by this bond, nor for robbery or thefts of money from the ¹⁷⁷ persons so covered, where proofs of such errors, carelessness, thefts, or robbery are conclusive, as negligence is not covered by this bond."

The complaint alleges that defendant, in consideration of plaintiff's becoming a guarantor for him by executing this bond, agreed to indemnify it against any losses, damages, or expenses it might sustain or become liable for in consequence of executing the bond; also, that this bond was in the form requested by the defendant; also, that defendant further agreed "to admit the voucher or other proper evidence of such payment by plaintiff as conclusive evidence against himself as to the fact and extent of his liability to this plaintiff." It is further alleged that defend-

ant, within the scope of his employment as receiving agent of plaintiff, issued tickets for, received, and took in, at one of the elevator company's elevators, a certain number of bushels of wheat and dockage, but of the same only delivered to the elevator company a certain less number of bushels at the termination of his employment; leaving nearly one thousand bushels which he never delivered, although requested to do so. The complaint then states specifically the manner in which this shortage was ascertained and made to appear, which was the exact manner provided for in the bond. It then negatives specifically that this shortage was caused by any of the exceptions named in the bond. It is then alleged that the elevator company presented its claim for this shortage to the plaintiff; that the latter was compelled to pay the same, and now holds the elevator's voucher for the same, but that defendant refuses to indemnify the plaintiff for the money thus paid out in his behalf. Counsel for plaintiff asks us to pass upon numerous questions touching the construction of this bond; but as it is a novel contract, and its provisions prolix, somewhat obscure, and sometimes apparently contradictory, we deem it unwise, upon a demurrer, to decide much except what is necessary to determine whether a cause of action is stated. Hence we shall confine ourselves mainly to the specific objections made by defendant's counsel to the sufficiency of the complaint.

1. The first objection urged against the complaint is, that it does not allege that the plaintiff had a license to do an insurance business in this state, as required by the General Statutes of 1894, section 3331. Notwithstanding that there would seem to be some decisions holding otherwise, we are of opinion that the case is one where the maxim, "*Omnia rite acta praesumuntur*," is applicable. Noncompliance with the laws of this state ¹⁷⁸ will not be presumed, but, if it exists, must be set up in defense: *Williams v. Cheney*, 3 Gray, 215.

2. The second point urged is, that a contract guaranteeing the honesty of employes is void as being against public policy; that it is the duty of all employers dealing with the general public to employ honest agents; that the effect of such a contract as set out in the complaint is to make it a matter of indifference to an elevator company whether it employs honest or dishonest agents to deal with the patrons of the elevator. There is nothing whatever in this objection. The same principle is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duties. And it is wholly im-

material whether the guarantor is a private person, or an incorporated guaranty insurance company. The advantages of the latter over the former mode of suretyship, if properly conducted, are very apparent: 2 May on Insurance, sec. 541.

3. The third objection is, that the stipulation between the plaintiff and defendant that the voucher, or other evidence of payment by plaintiff to the elevator company, should be conclusive evidence against the defendant as to the fact and extent of his liability to the plaintiff, is void as being against public policy.

This question is not really involved in this appeal, but, as it is one which will necessarily arise at the very threshold of the trial of the action, it may properly be considered now. The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So, also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may, by his own ex parte acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge of his own case. The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person, such as the architect or engineer, as to the ¹⁷⁹ amount or character of the work, is made conclusive between the parties, in the absence of fraud or mistake. Nor is it at all analogous to a provision in an executory contract for the sale or manufacture of an article to the satisfaction of the buyer, where, if the article is declined, the parties are, in contemplation of law, left in statu quo. In the present case, the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and exclusive judge of both its existence and extent. Such an agreement is clearly against public policy. If the provision had been that the voucher, or other evidence of payment, should be merely prima facie evidence of the fact and extent of defendant's liability—thus merely shifting the burden of proof, but leaving the defendant at liberty to rebut this prima facie evidence—although even then a somewhat drastic provision, we do not think that it could be held to contravene public policy. To that extent

we think this provision is valid, but, in so far as it assumes to make the voucher of payment by plaintiff conclusive of defendant's liability, it is void.

4. The fourth objection urged against the complaint is, that while the bond only covers acts of fraud and dishonesty, it contains no allegation that this shortage was caused by the fraud or dishonesty of the defendant.

Whoever drafted this bond used language very loosely, and employed a great many words to express, or else conceal, very few ideas. But after taking it by the four corners, and considering all its provisions, our construction is, that the plaintiff was only bound to make good, and reimburse the elevator company for, loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant. But the bond also provides how the existence and amount of a shortage shall be ascertained, and that, when thus ascertained, it shall be accepted as evidence that it was caused by the fraud or dishonesty of the defendant, and not by any of the various other causes, enumerated as exceptions, for which the plaintiff was not to be liable; in other words, that a shortage ascertained in the manner prescribed should be prima facie evidence of its existence, and that it was caused by defendant's fraud or dishonesty, thus casting the burden upon the plaintiff to rebut this prima facie case by proof. It is not bound to do this by affirmative ¹⁸⁰ evidence showing the particular one of the causes, enumerated as exceptions, which produced the shortage, but may do it by negative evidence showing that it was not caused by the fraud or dishonesty of the defendant, and hence must have been produced by one or more of the excepted causes. This it may do by a fair preponderance of evidence as to any of the excepted causes, except errors or carelessness in weighing, and thefts by persons other than those covered by the bond, in which cases the proofs must be conclusive. The word "conclusive," in that connection, we think, must be construed as meaning so strong as to require a finding or verdict that the shortage resulted from the cause alleged. This may also be done by negative or circumstantial evidence. So much for the construction of the bond.

The bond having been executed at the request of the defendant, and in the form requested by him, it follows that his obligation to indemnify the plaintiff is coextensive with that of the plaintiff to reimburse the elevator company; also, that any provisions in the bond, as to proof of liability, binding on the plain-

tiff in favor of the elevator company, are equally binding on the defendant in an action brought by the plaintiff against him to recover indemnity for what it has paid in his behalf. Therefore, it follows that the complaint alleges facts which, under the provisions of the bond, constitute a cause of action against the defendant; that is, if all the facts alleged are proved on the trial, it would follow, as a matter of law, that the plaintiff would be entitled to recover. That the facts alleged are, in one sense, merely evidentiary, and may be rebutted by other evidence, is not material, inasmuch as, by the agreement of the parties, they make out *prima facie* a cause of action, and, if not rebutted, they conclusively make it out. Otherwise expressed, under the contract of the parties, the facts alleged prove that the shortage was caused by defendant's fraud or dishonesty. Under these circumstances, an express and direct allegation that it was so caused was unnecessary. The complaint states a cause of action.

Order reversed.

FIDELITY INSURANCE is a comparatively new business; but it has been held that a bond of indemnity given by a fidelity insurance company is governed by the principles of interpretation which apply to ordinary policies of insurance: Note to Fidelity etc. Co. v. Gate City Nat. Bank, 54 Am. St. Rep. 446.

STIPULATIONS AS TO EVIDENCE, when inserted in a contract, do not deprive the plaintiff, as a general rule, of the benefit of rules of law established for the guidance of courts and juries in the investigation and determination of facts: See monographic note to Utter v. Travelers' Ins. Co., 8 Am. St. Rep. 921, on whether parties may, by their stipulations inserted in a contract, make a rule of evidence by which the courts must be bound in litigation subsequently arising under such contract.

SCHULTZ v. HOWARD. SCHULTZ v. WORLD'S FAIR MASONIC HOTEL COMPANY.

[63 MINNESOTA, 196.]

EVIDENCE—LAWS OF ANOTHER STATE—PRESUMPTION.—In the absence of an allegation to the contrary, a court will assume that the law of another state is the same as the law of this state.

EVIDENCE.—STATUTES OF ANOTHER STATE must be pleaded and proved as any other fact. The courts will not take judicial notice of them.

CONTRACTS—CONFLICT OF LAWS.—THE PLACE of the contract regulates its validity, interpretation, and the nature of its obligation. By "nature" is meant those qualities which inhere in and pertain to it; as, whether it is joint, or joint and several.

NEGOTIABLE INSTRUMENTS—ORIGINAL PROMISORS OR MAKERS—WHO ARE.—Persons who sign their names on the

back of a note, when it is executed, for the purpose of giving credit to the maker, with the payee, and as security for the payment of the note, are original promisors or makers, although, as between themselves and the other makers, they may be mere sureties for the latter.

NEGOTIABLE INSTRUMENTS—JOINT AND SEVERAL OBLIGATION OF "IRREGULAR INDORSERS."—If some of the promisors sign a promissory note at the foot, and others on the back, the obligation, toward the payee, of those who place their names on the back of the paper, though it is joint in form, is joint and several, and not joint, with the obligation of those who sign the note in the usual place, although the obligation of those who sign on the back of the note, as between themselves, may be joint. It may be joint as between themselves, and yet joint and several as to those who signed at the foot.

JOINT LIABILITY—PRESUMPTION.—There should be no presumption indulged in in favor of an obligation being joint instead of joint and several.

DEFINITIONS.—"IRREGULAR INDORSERS" are original promisors or makers, and the courts, in defining the nature of their obligation as makers, indorsers, or guarantors, have indiscriminately and interchangeably spoken of them as "original promisors," "joint makers," and "joint and several makers."

Action on promissory notes brought by Schultz and another against the defendants, J. C. Howard, J. W. Nash, W. M. Brackett, J. W. Stone, and W. H. Lynn. The last-named defendant was a guarantor in the first action, on two of the notes, and the other defendants were, in form, indorsers, but were sued as makers. The second action was brought upon three promissory notes of like tenor, except as to the amounts and times of payment. The indorsements on all the notes were the same, except that on the notes sued upon in the second action the indorsement of defendant Lynn was in the same form as the indorsements of the other defendants, and not in the form of a guaranty of collection, as in the first case. In the second action, but not in the first, the World's Fair Masonic Hotel Company was also joined as defendant. There was a separate appeal by each of the defendants, the hotel company excepted, in each action, from orders sustaining the plaintiffs' demurrers to parts of the separate answer of each defendant.

Louis A. Reed, for the appellants.

James O. Pierce, for the respondents.

200 MITCHELL, J. This was an action on two promissory notes, upon which defendant Lynn was guarantor, and the other defendants makers. The case comes here on appeal from an order sustaining a demurrer to defendants' second defense, by which they claim that they were released by reason of the plain-

tiffs having previously obtained judgment upon the notes against another maker alone, who is not a party to this action.

The principle sought to be invoked is that joint contractors must all be sued together; that, if one is omitted, the nonjoinder may be pleaded in abatement. Hence, if the cause of action against one of the joint contractors is merged in a judgment, the others are released, because it is then impossible to maintain a joint action against all. We nowhere find in the pleadings anything to show that the notes sued on were in form joint, and not joint and several; and on that ground alone the order appealed from might be affirmed. But both sides have argued the case on the assumption that the notes are of the following tenor:

“\$7,000.00

Chicago, March 20th, 1893.

“April first after date, for value received, we promise to pay to the order of Schultz Bros. seven thousand and no 100 dollars, at the Globe National Bank, with interest at — per cent per annum, after —, until paid.

“WORLD’S FAIR MASONIC HOTEL CO.,

“By J. C. HOWARD, President.”

Indorsed: “J. C. Howard, J. W. Nash, W. M. Brackett, J. W. Stone.

“I hereby guaranty the collection of the within note, if not paid at maturity. Value rec’d. W. H. LYNN.”

The other note is of like tenor, except as to amount and time of payment.

The judgment alleged in the answer to have been obtained on the notes in the state of Illinois was against the World’s Fair Masonic Hotel Company, an Illinois corporation. It stands admitted that those whose names are written on the back of the notes signed them at the date of their execution for the purpose of giving credit to the ²⁰¹ hotel company with the plaintiffs, and as security for the payment of the notes. Hence, according to the law of this state—and, in the absence of an allegation to the contrary, we must assume that the law of Illinois is the same—the defendants Howard, Nash, Brackett, and Stone were original promisors or makers, although, as between themselves and the hotel company, they were mere sureties for the latter. Counsel for plaintiff cites in his brief the statute of Illinois, to the effect that “all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants.” Assuming that the Globe National Bank, at which the notes were payable,

is in Illinois, this statute, if pleaded, would have been decisive of the case, for it is settled law that the place of the contract regulates its validity, interpretation, and the nature of its obligation. By "nature" is meant those qualities which inhere in and pertain to it; as whether it is joint, or joint and several: Daniel on Negotiable Instruments, sec. 872. But the statutes of another state must be pleaded and proved as any other fact. The courts will not take judicial notice of them.

Counsel's further contention is, that whatever the form of the contract, when it appears that some of the obligors executed it merely as sureties for another who was the principal debtor, then, as between the former and the latter, the obligation is joint and several, and not joint. There is much force in this contention, for it would seem unreasonable that the obligee could not first proceed to enforce the contract against the principal obligor, without releasing the sureties; and we do not remember of ever having met with a case in which it was held that such would be the effect of his doing so. But it is not necessary in this case to go that far.

We are of opinion that where, as here, some of the promisors sign a promissory note at the foot and others on the back, it should be held that the intention was that, as between the two classes of promisors, their obligation should be joint and several, and not joint. It is true that, under the decisions of this court, where they sign their names under the circumstances which existed in this case, they are all original promisors or makers, whether their names are found at the foot or on the back of the note. But the fact cannot be ignored that by signing their names on the back of a note, instead of in the ²⁰² usual and ordinary place, parties must have meant to effect some difference in the nature of their obligation from what it would have been had they affixed their signatures at the foot of the note, along with the other makers. We suppose that, as a matter of fact, in no case do those who sign their names on the back of a note intend to assume the obligation of "joint obligors," strictly so called, with those who sign at the foot. Their actual intention is, doubtless, to assume the obligation of either sureties or indorsers. In order to establish a fixed rule governing negotiable paper, we have held that although, as between themselves and the other makers, they may be mere sureties, yet, as to the payee, they must be conclusively presumed to have assumed the obligation of makers. But there is nothing in this doctrine at all inconsistent with giving

effect to the act of the parties in placing their names on the back of the paper as expressing an intent that their obligation should be joint and several, and not joint, with the obligation of those who sign the note in the usual place. This construction of their contract is the one most favorable to themselves; for if they are sureties, as they usually are, it leaves the holder of the note at liberty to first pursue his remedies against the principal debtor. There should be no presumptions indulged in in favor of an obligation being joint instead of joint and several. The rules of law as to joint obligations are, at best, extremely technical and inconvenient; and many states have, like Illinois, enacted statutes declaring them to be joint and several.

We have examined our own decisions, as well as those of Massachusetts, from which we adopted the doctrine holding that these "irregular indorsers" are original promisors or makers, and find nothing in any of them in conflict with the conclusion at which we have arrived. We find that, in defining the nature of their obligation, they are indiscriminately and interchangeably spoken of as "original promisors," "joint makers," and "joint and several makers." But in all these cases the question before the court was not whether their obligation was joint, or joint and several, with that of the other parties to the paper, but whether it was that of maker or that of indorser or of guarantor; and these various expressions were used merely to state that their obligation was the former, and not the latter. We do not wish to be understood as holding that, as between themselves, the obligation of those who signed on the back of the ²⁰³ notes was joint and several. It may be joint as between themselves, and yet joint and several as to those who signed at the foot.

The conclusion at which we have arrived on this question renders it unnecessary to consider any other.

The result is, that in all of the actions between these parties the orders appealed from are affirmed.

EVIDENCE—STATUTES OF ANOTHER STATE.—The courts of one state do not take judicial notice of the laws of another, but they must be pleaded and proved like other facts: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note; *Wickersham v. Johnston*, 104 Cal. 407; 43 Am. St. Rep. 118. In the absence of proof, the laws of both states are presumed to be the same: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520; *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348; 52 Am. St. Rep. 94. In the absence of proof, the statutory law of another state is presumed to be as in this: *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779. Contra, *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 889.

CONFLICT OF LAWS—PLACE OF CONTRACT.—The law of the place where a contract is made governs, so far as the validity or obligation of the contract is concerned: *Cochran v. Ward*, 5 Ind. App. 89; 51 Am. St. Rep. 229, and note.

NEGOTIABLE INSTRUMENTS—ORIGINAL PROMISORS, WHO ARE.—If a promissory note is indorsed before its delivery, the liability of the indorser is that of an original promisor and comaker: *Richardson v. Foster*, 73 Miss. 12; 55 Am. St. Rep. 481; *Donohoe Kelly etc. Co. v. Puget Sound etc. Bank*, 13 Wash. 407; 52 Am. St. Rep. 57, and note; *Central Nat. Bank v. Dreydoppel*, 134 Pa. St. 499; 19 Am. St. Rep. 713. Other cases hold that one who writes his name on the back of a negotiable instrument before it has been indorsed by the payee, who subsequently indorses it, is bound only as a second indorser: Note to *Central Nat. Bank v. Dreydoppel*, 19 Am. St. Rep. 714; and that a third person who indorses a negotiable note concurrently with its execution, and at or before its delivery to the payee, or indorsement by him, is presumptively liable only as a second indorser, but may be shown by parol evidence to be liable as a joint maker or guarantor, according to the intention of the parties as disclosed by the facts: *Deering v. Creighton*, 19 Or. 118; 20 Am. St. Rep. 800.

TURLE v. SARGENT.

[63 MINNESOTA, 211.]

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITIES—NO CONSIDERATION.—If a third party, without any consideration personal to himself, gives his promissory note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor or disadvantage to the creditor, the note is without consideration. Hence, if one partner misappropriates money belonging to his copartner, a note given by a third person to the latter upon his promise not to prosecute criminally, is without consideration.

NEGOTIABLE INSTRUMENTS — WHEN RENEWAL IS WITHOUT CONSIDERATION.—If an original note has been given without consideration, each successive renewal thereof is without consideration, unless there is some consideration to support it other than the mere surrender and renewal of the original note.

Action by the plaintiff, Turle, on a promissory note, given by the defendants, Sargent and another. There was a judgment for the defendants, and the plaintiff appealed.

McCordic & Crosby and Billson, Congdon & Dickinson, for the appellant.

Cash, Williams & Chester, for the respondents.

¶14 **START, C. J.** 1. This is an action upon a promissory note of the defendants for the sum of \$5,826.67, payable to the plaintiff. The defendants admitted the making of the note, but alleged as a defense that there was no consideration for the same; and, further, that it was given in renewal of a former note for \$8,000, given by defendant William C. Sargent, and that the only

consideration for this last note was the agreement of the plaintiff not to prosecute criminally one William T. Hooker for misappropriating the sum of \$8,000, belonging to the plaintiff. The reply was simply a general denial. Trial by the court without a jury, and judgment ordered for the defendants, and from an order denying his motion for a new trial plaintiff appealed.

The trial court found that no consideration was given for the note in suit, or for any of the notes of which it was a renewal, other than the consideration for the original note of \$8,000. As to this original note the court found: That for some two years prior to the date thereof—February 1, 1890—the plaintiff and Hooker were partners in business, which was under the management of the latter, but the former furnished all the capital therefor. That while they were such partners Hooker misappropriated about \$8,000 of the funds of the firm, but in fact, as between the parties, they were the funds of the plaintiff. Thereupon plaintiff threatened the defendant William C. Sargent, the personal friend of Hooker, to cause criminal proceedings to be instituted against him for such misappropriation, unless the matter was adjusted; and that the only consideration for the giving of the original note was the agreement of the plaintiff not to so prosecute him. That this note was not given or taken in payment of Hooker's debt, or the amount of this misappropriation; neither was there any agreement for any extension of time to Hooker for the payment of his debt to the plaintiff in consideration of the giving of the note by the defendant. This note was renewed several times until September 29, 1892, when the sum of \$8,826.67, appearing ²¹⁵ to be due on the original note as renewed, was voluntarily and without any consideration therefor reduced to the sum of \$5,826.67, and the note therefor in suit was signed by the defendant William C. Sargent, and indorsed before delivery by his mother, the defendant Mary C. Sargent, solely at his request, and without any consideration.

2. If the evidence justifies the findings of fact, the conclusion that the defendants are entitled to judgment is correct. The plaintiff, however, while conceding that the evidence supports the finding that the original note was given upon his agreement not to prosecute Hooker, denies that this was an illegal consideration, or that it was the only consideration for the note. As to the first, his claim is, that the plaintiff and Hooker being partners, it was a legal impossibility for the latter to embezzle partnership funds, and therefore his misappropriation of the funds was not a crime,

and the agreement not to prosecute him was perfectly harmless. We are not prepared to concede this proposition, either as a question of law or morals: Gen. Stats. 1894, sec. 6710. But we are not called upon to decide the question, for, if the promise not to prosecute was not illegal, because it related to a supposed crime which it was impossible for Hooker to commit, it necessarily follows that a promise to refrain from doing that which it is legally impossible to do cannot be a valid consideration for the execution of a promissory note. Therefore, if, as the court has found, there was no other consideration for this original note except such promise, it was wholly without any consideration.

The plaintiff's counsel, however, insists that the inevitable inference from the special facts found by the court is, that the note was given as collateral security for the pre-existing debt of Hooker to the plaintiff, and that this was a valid consideration to support the note. He reaches this conclusion of fact by assuming as his premise a fact which the trial court did not find, but negatived by its finding—that there was no other consideration for the note except the agreement not to prosecute. This is the argument: "It is certain that the note was given either in payment of Hooker's debt or as collateral thereto. The court has found that it was not taken in payment, and we concede that the case justified this finding. It will be seen from the case that it must, therefore, have been intended as a collateral ²¹⁶ security." The conclusion must be correct if the first proposition of the syllogism is true. We concede its correctness, for the purposes of this case, without so deciding, and proceed to the proposition of law that the giving of the note as collateral to the debt of Hooker was for a valid consideration. The court found, and it is practically conceded, that the note was not given as payment, conditional or absolute, of Hooker's debt; and that there was no agreement to extend the time of its payment. Where, then, is it possible to find a consideration for the note? Neither the maker nor Hooker was benefited by the giving of the note. The former owed no duty or obligation in the premises to the plaintiff, and the plaintiff, by accepting the note, assumed no duty or obligation to the maker or anyone else, and was in no way harmed by it. The case falls within the undoubted rule that, if a third party, without consideration personal to himself, gives his promissory note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor or disadvantage to the creditor, the note

is without consideration: *Security Bank v. Bell*, 32 Minn. 409; 1 *Daniel on Negotiable Instruments*, sec. 185; 2 *Randolph on Commercial Paper*, sec. 446; *Tiedeman on Commercial Paper*, sec. 170.

In the case of *Security Bank v. Bell*, 32 Minn. 409, the facts were that the defendant, at the request of the plaintiff, gave his note as collateral security for a past due note (for the same amount) of his son, and there was no other consideration for it; and this court held that there was an entire want of consideration, stating the proposition without discussion or citation of authorities. Manifestly, the court was of the opinion that the question was so thoroughly settled upon principle and authority that it would be an affectation of learning to dispose of the case in any different manner. The case has been since referred to by this court with implied approval, and distinguished from a case where the time of payment of the debt for which the note was given as collateral was extended: *Nichols etc. Co. v. Dedrick*, 61 Minn. 513. The decisions of this court cited and relied upon by plaintiff in support of his proposition that, if defendants' note was given merely as collateral to Hooker's debt, there was a valid consideration, are not in point. They are all of them cases where the original debtor gave his own note as security for his own debt, or indorsed the note of a third party for that purpose, or where ²¹⁷ the creditor received the note of a third party direct in payment of the debt, or in consideration of a valid agreement to extend the time of its payment. Not one of them is similar in its facts to the cases of *Security Bank v. Bell*, 32 Minn. 409, and the one at bar, where the only consideration for the note of a third party, given by him direct to the creditor, was the naked pre-existing debt of another.

The case of *Rosemond v. Graham*, 54 Minn. 323, 40 Am. St. Rep. 336, does not purport to overrule *Security Bank v. Bell*, 32 Minn. 409, and an analysis of the former will show clearly that the two cases are not inconsistent. In *Rosemond v. Graham*, 54 Minn. 323, 40 Am. St. Rep. 336, the payee of a negotiable promissory note transferred it before maturity by indorsement to his creditor as collateral security for an antecedent debt, and it was held that the indorsee took the paper free from all defenses which might have been available between the original parties. This conclusion necessarily rests upon the proposition that the indorsee was a bona fide holder for value, and therefore the transfer was supported by a valid consideration. The opinion, how-

ever, does not suggest what the consideration to support the transfer was, but follows the case of *Railroad Co. v. National Bank*, 102 U. S. 14. Referring, then, to this last case to ascertain the consideration for such transfer, we find that the majority opinion places the decision upon the ground that the transfer of the paper was supported by a valid consideration, for the reason that where a creditor accepts from his debtor a transfer of negotiable paper by indorsement, as collateral security for his debt, he, as indorsee, takes the paper charged with the obligation imposed by the commercial law to present it for payment, and give notice of nonpayment; and, having assumed the responsibilities of a holder for value, he is entitled to the rights and privileges pertaining to such position. Mr. Justice Bradley, in a concurring opinion, stated that the true consideration for the transfer was the indebtedness of the indorser to the indorsee, and his obligation to pay or secure it; that the transfer of the paper rested upon the same consideration as if the debtor had given a mortgage or pledge of property as security for his debt, and, in such case, his debt and his obligation to pay it or secure its payment would be a valid consideration. It is manifest that this suggested consideration for the support of a transfer of negotiable paper by a debtor to his creditor as collateral security for his own debt does not exist where a third party gives his note direct ²¹⁸ to the creditor as collateral to the debt of another. In the latter case the creditor assumes no obligation. He is not bound to present the note for payment, and give notice of nonpayment. Neither is there any obligation or duty on the part of the maker to pay or secure the debt of another. When the defendant Sargent, in this case, gave the original note to the plaintiff as collateral to Hooker's debt (if he did so), he was under no obligation or duty to pay or secure the debt; and the mere naked debt of Hooker, without benefit or disadvantage to any of the parties, was not a legal consideration for the note, and this case falls directly within and is ruled by the case of *Security Bank v. Bell*, 32 Minn. 409, which has not been overruled by *Rosemond v. Graham*, 54 Minn. 323, 40 Am. St. Rep. 336, for the two cases are radically dissimilar in their facts and the law applicable thereto.

3. The original note having been given without any consideration, then each successive renewal thereof, including the note in suit, was also given without any consideration, unless there was some consideration to support it other than the mere surrender and renewal of the original note. The trial court found that

there was no other consideration for the note in suit, or for any of the notes of which it was a renewal, except the original note. We have reviewed the evidence, and are of the opinion that this finding is sustained by the evidence.

The trial court did not err in refusing to amend its findings in the particulars of which the plaintiff complains.

Order affirmed.

CONTRACTS — NEGOTIABLE INSTRUMENTS — CONSIDERATION.—Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a contract: *Note to Hamer v. Sidway*, 21 Am. St. Rep. 700. A contract must rest upon a consideration of some value: *Shepard v. Rhodes*, 7 R. L. 470; 84 Am. Dec. 573. In other words, there must be a consideration to support every promise, whether evidenced by writing or not: *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252. A waiver of a legal right by the promisee at the request of the promisor is sufficient: *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693; but a contract to refrain from prosecuting a criminal charge, upon the receipt of money, or a promise of it, as by the giving of a promissory note is generally held to be void, as against public policy, or because of illegality of consideration, not only where payment, or promise of payment, is made by the guilty party, or those standing in certain relations to him: *Henderson v. Palmer*, 71 Ill. 579; 22 Am. Rep. 117, and note; *McMahon v. Smith*, 47 Conn. 221; 36 Am. Rep. 67; note to *Fulton v. Hood*, 75 Am. Dec. 672; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; but where the payment, or promise of payment, by note or otherwise, is made by other third persons: *Plumer v. Smith*, 5 N. H. 553; 22 Am. Dec. 478; *Jones v. Rice*, 18 Pick. 440; 29 Am. Dec. 612; *Hinesburgh v. Sumner*, 9 Vt. 23; 31 Am. Dec. 599. A note given for moneys stolen or embezzled, has, however, been held, in some cases, to be founded upon a legal consideration, especially where the giving of the note was not preceded by threats of criminal prosecution: *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 335; *Board of Supervisors v. Alford*, 65 Miss. 63; 7 Am. St. Rep. 637; notes to *McMahon v. Smith*, 36 Am. Rep. 70; *Henderson v. Palmer*, 22 Am. Rep. 121. One cannot maintain an action to recover money paid by him upon a note given, wholly or partly to compound a felony, although "was procured from him by duress and undue influence: *Haynes v. Rudd*, 102 N. Y. 372; 55 Am. Rep. 815.

ERMENTROUT v. GIRARD FIRE AND MARINE INSURANCE COMPANY OF PHILADELPHIA.

[63 MINNESOTA, 305.]

INSURANCE—FIRE AS PROXIMATE CAUSE OF LOSS.—To render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property should be actually ignited or consumed by fire.

INSURANCE—LOSS BY FIRE INCLUDES WHAT.—If a building is insured "against all direct loss or damage by fire," under a policy providing that, if the building falls, "except as a result of fire," the insurance shall immediately cease, and a building, adjacent to the one insured, catches fire, and, being partially consumed, falls, as a direct result of the fire, carrying down with it not only the partition wall between the buildings but also a part of the insured building, the fall of the latter is the "result of fire," and a "direct loss or damage by fire," although no part of it ignited or was consumed by fire.

INSURANCE—MEANING OF "DIRECT" LOSS.—The word "direct," in a policy insuring a building "against all direct loss or damage by fire," means merely "immediate," or "proximate," as distinguished from "remote."

INSURANCE—NOTICE OF LOSS AS CONDITION PRECEDENT.—If a policy of insurance requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to a right of action on the policy.

INSURANCE—BREACH OF CONDITION TO GIVE "IMMEDIATE" NOTICE OF LOSS.—A failure, for nearly sixty days after a fire, to give notice of loss, is, as a matter of law, a breach of a condition of the policy requiring the insured to give "immediate" notice of loss.

INSURANCE—AUTHORITY OF AGENTS—ACCEPTANCE OR WAIVER OF NOTICE OF LOSS.—Authority to make a contract of insurance carries with it no implied authority to act in the matter of a loss, under the policy, after it has occurred. Hence, if the expressed authority of agents is simply to accept applications for insurance, and to receive the premiums thereon, to fix the premium or rate of insurance, and to fill up, countersign, and issue policies thereon, which they receive from the company, signed by its president and secretary, they have no authority, express or implied, to accept or waive notice of loss.

INSURANCE—WAIVER OF NOTICE OF LOSS AFTER POLICY IS DEAD.—If proofs of loss are transmitted to the general managers of an insurance company, after the policy is dead, because of a failure to give "immediate" notice of loss, as therein required, the company's denial of any liability under the policy, though it retains the proofs of loss, is not a waiver of a failure to give notice of loss.

Action by ErmentROUT and another, in which a motion to dismiss prevailed, and the plaintiffs appealed.

Merrick & Merrick, for the appellant.

Kueffner, Fauntleroy & Rice and Freeman P. Lane, for the respondent.

306 MITCHELL, J. This action was brought on a policy issued by the defendant to the plaintiff Ermentrout, insuring him, to the amount of one thousand dollars, for one year "against all direct loss or damage by fire," on his "brick, iron-roof, grain warehouse building, and bins therein, including foundations and all permanent fixtures," etc. The only other provisions of the policy involved on this appeal are as follows: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company." 307 "The sum for which this company is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company, in accordance with the terms of this policy."

When the plaintiff rested, the defendant moved to dismiss the action, for the reason that plaintiffs had failed to establish their cause of action, in that: 1. It did not appear that the loss or damage was the direct result of fire; 2. That it did appear that the plaintiffs had not given immediate notice of the loss in writing to the company. The judge granted the motion, although placing his decision exclusively on the last ground. Of course, if the action should have been dismissed on either ground, the ruling of the court must be affirmed.

1. The insured building was adjacent to another used as a feed mill, the wall between them being a partition wall. There is no claim that any part of the insured building was actually ignited or consumed by fire. The fire was confined to the adjacent feedmill, which fell, carrying down with it the partition wall and a part of the elevator insured, and the question to which both the examination and cross-examination of plaintiff's witnesses seem to have been directed was whether the fall caused the fire or the fire caused the fall. While the evidence offered by plaintiff was not of the most convincing or satisfactory character, yet we think it was such that the jury might have found either way on the question. We think that, as the evidence stood when plaintiff rested, it would have justified the jury in finding that the feedmill had caught fire before it fell, and that the fall was caused by the partial consumption of the feedmill, and the weakening of the partition wall by the fire. If such were the facts, then we think the falling of the insured building was a "direct loss or damage by fire," within the meaning of the policy.

The provision that if the building fell; "except as the result of fire," the insurance thereon shall cease, was introduced into the policy by the insurer for his own benefit, and, under a familiar rule, must be construed, in case of ambiguity, most strongly against it. We think it has reference only to cases where the building might fall from some other cause than fire—as, for example, defective construction, the withdrawal of necessary support, storm, flood, or other ³⁰⁸ like cause—and fire thereafter ensued. But it was not intended to exclude cases where fire was the immediate or proximate cause of the fall. To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. This is so well settled that the citation of authorities in support of the proposition is unnecessary.

The question is, Was fire the efficient and proximate cause of the loss or damage? Thus, in one case, where a house protected by a policy of insurance against damage by fire was injured by the falling of part of the wall of an adjacent house, in consequence of fire in the latter house, it was held that the fire was the proximate cause of the loss, and that the insurers were liable, although the house insured had never been on fire: *Johnston v. West of Scotland Ins. Co.*, 7 Shaw & D. 52. The word "direct," in the policy, means merely "immediate," or "proximate," as distinguished from "remote." Counsel for defendant cites, in support of a contrary view, some language used by way of illustration in *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 416, in which the court names "destruction through the falling of burning walls" as an instance of remoteness of agency. The question was not before the court, for in that case the insured property was physically burned by the direct action of fire. If the court meant what counsel claims, we cannot avoid the conclusion that the illustration was, to say the least of it, an unfortunate one.

3. Seeley & Co., who issued the policy, were the local agents of the defendant, with authority "to receive proposals for insurance . . . within the county of Hennepin, and to receive premiums thereon, and to give receipts and issue policies therefor." It also appeared that these agents had authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign, and issue policies thereon, which they received from the company, signed by its president and secretary. So far as appeared from the evidence, this was the extent of their

actual authority, and there was no evidence tending to show that their apparent authority was other or greater than their actual authority. The only evidence of the giving of notice of loss, except the sending of proofs of loss to the general managers of the defendant at ³⁰⁰ Chicago on or after October 9th (received by them on or about October 23d), was to the effect that, within a day or two after the loss, one of the plaintiffs verbally notified Seeley & Co. that "the fire had destroyed the building." Although probably not material, it does not appear that he requested Seeley & Co. to give or forward the notice to the company, or that they promised to do so, or made any reply to the plaintiff. As the loss occurred on August 12th, it is clear, under the authorities, that, as a matter of law, the time for giving notice of loss had expired before the proofs of loss were sent to Chicago. It is also settled law that, where the policy requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to the right of action on the policy. Hence, for their right of recovery on the policy, the plaintiffs have to rely on the verbal notice given to Seeley & Co.

If Seeley & Co. were the proper parties to whom to give this notice—in other words, if it was within the scope of their authority to receive notice of loss—we would not feel any doubt but that if, when they received verbal notice, they made no objection to its form, they would be deemed to have waived the omission to give it in writing. But it is self-evident that if they had no authority to receive such notice, then they could waive nothing in the matter. Upon this state of facts, it was not within the scope of the authority of Seeley & Co. to receive or waive notice of loss, and hence notice to them was not notice to the company. Even if there could be any doubt of the correctness of this proposition as a new question, it has been too long and too well settled in this state to be now considered open: *Bowlin v. Hekla etc. Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239; *Shapiro v. St. Paul etc. Ins. Co.*, 61 Minn. 135. But we think the rule is correct upon both principle and authority. It is in accordance with the general principles of the law of agency. It is elementary that a principal is only liable for acts done by his agent within the scope of the authority, actual or apparent, with which the principal has clothed him; that it rests entirely with the principal to determine the extent of the authority which he will give to his agent; also, that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority.

§10 In insurance cases courts frequently inaccurately classify agents as "local" and "general." But the extent of the territory which is to be the field of his agency is no test of the extent of an agent's authority within that field. His field of operations may include the whole United States, and yet his powers be special and limited. On the other hand, his field of operations may be confined to a single county or city, and yet his authority within that field be unlimited. In the present case, there is no question of apparent, as distinguished from actual, authority. The question is simply one of actual authority, expressed or implied. Authority to act in the matter of a loss under the policy, after it has occurred, is not expressly given. All the authority expressed relates to the making of the contract of insurance. It is a fundamental principle in the law of agency that a delegation of power, unless its extent be otherwise expressly limited, carries with it, as a necessary incident, the power to do all those things which are reasonably necessary to carry into effect the main power expressly conferred. But it is equally fundamental that the power implied shall not be greater than that fairly and legitimately warranted by the facts; in other words, an implied agency is not to be extended by construction beyond the obvious purpose for which the agency was created. We do not think that mere authority to make a contract of insurance carries with it implied authority to act in the matter of a loss under the policy after it has occurred. If the implied authority extends to accepting notice of the loss, it would logically follow that it also extends to proof of loss, and even to the adjustment of the loss—a length to which no court has ever gone. The rule which we have adopted is also in accordance with the general current of the authorities: *Lohnes v. Insurance Co.*, 121 Mass. 439; *Smith v. Niagara etc. Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144; *Bush v. Westchester etc. Ins. Co.*, 63 N. Y. 531.

Occasional statements in some of the text-books seem to announce a different rule, but they are not borne out by the authorities cited in their support. For example, in *Wood on Insurance*, section 419, it is stated that, "where an agent is intrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent ^{§11} or subsequent, and may waive notice or proofs of loss, and may bind the company by his admissions in respect thereto." Upon an examina-

tion of the large number of authorities cited in support of the text, it will be found that not one of them tends to support the author's proposition as to proofs of loss, unless it be the *nisi prius* decision in *Ide v. Phoenix Ins. Co.*, 2 Biss. 333, in which the question is not discussed, no authorities are cited, and the statement of facts is so meager that it cannot be ascertained what the evidence was as to the actual or apparent authority of the agent. Most, if not all, of the other cases may be classified as follows: 1. Cases holding that, where an agent is authorized to make the contract of insurance and issue the policy, the company is bound by his acts, representations, or omissions preceding or accompanying the issuing of the policy. Considered as the statement of a general rule, this is the doctrine of all courts. 2. Cases holding that authority to make the original contract of insurance carries with it implied authority to modify or waive any of its conditions while the contract is still current, as by consenting to other insurance, change of risk, etc. This court has adopted this general rule, although some courts do not go that far. 3. Cases where the agent had, with the knowledge of the company, been in the habit of receiving notices of loss, proofs of loss, and adjusting losses, and it had thereby clothed him with apparent authority to do these things. 4. Cases where the authority of the agent to do the particular acts was admitted, or not disputed, and the only question was as to the effect of his acts, as, for example, whether they constituted a waiver.

3. When the general managers received the proofs of loss in October, they wrote to plaintiffs, stating that they were in receipt of papers purporting to be proofs of loss, but adding: "This is to notify you that we deny any liability under said policy on the part of this company." They did not, however, return the proofs of loss.

If the question was one of the sufficiency of the proofs of loss, we have no doubt the conduct of the general managers would have amounted to a waiver of any defect in them, either of form or substance. But this did not amount to any waiver of the prior failure of the plaintiffs to give notice of loss as required by the terms of the policy. It will be observed that by reason of this prior failure the ³¹² policy was already dead when the proofs of loss were received; also, that in this letter the general managers did not place their denial of liability on any particular ground, but denied all liability generally. What would have been the effect, under the circumstances, of placing their denial of liability

upon some specific ground other than the failure to give notice of loss we need not inquire. But there was nothing in the language or conduct of the general managers that could be construed as a waiver of plaintiffs' prior failure to give notice of the loss, by reason of which the policy was already dead. If the policy had been still alive, and the plaintiff still had time within which to give the notice, or to supply defects in one already given, a different question would be presented, and many of the numerous cases cited by plaintiffs' counsel would have been in point.

Our conclusion is that the court was right in dismissing the action, on the ground that plaintiffs had failed to give notice of loss as required by the policy.

Order affirmed.

INSURANCE.—An insurance policy which insures against loss or damage by fire, without qualification, is broad enough to include all fires, however originating, and all damages therefrom, of whatever character: *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904. Insurers against fire are answerable for direct and immediate, but not for consequential and remote, losses from the peril insured against: *Hillier v. Allegheny etc. Ins. Co.*, 8 Pa. St. 470; 45 Am. Dec. 656. Appended to each of these two cases is a monographic note showing what is included in loss by fire. Proof of loss stipulated for in a policy of fire insurance must be made within the time stipulated, as a condition precedent to the payment of the loss, or the condition as to proof must be proved to have been waived: *Southern Home etc. Assn. v. Home Ins. Co.*, 94 Ga. 167; 47 Am. St. Rep. 147, and note. Notice of loss is "immediate" if given to an agent of the insurer a day or so after the loss occurs, with a request that he notify his principal, and he at once complies with such request; but notice by parol to an agent is of no effect where the charter contains a condition requiring notice of the loss to be given in writing to the secretary or one of the directors: *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; 54 Am. St. Rep. 196, and note. A condition in the policy that notice of loss must be given "forthwith" is synonymous with a condition that such notice must be given within a "reasonable" time: *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395; note to *Burlington Ins. Co. v. Lowery*, 54 Am. St. Rep. 199; *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67. For circumstances under which, a delay of six days, eleven days, twenty days, thirty-eight days, and fifty days, was, in each respective case, held not to be a "reasonable" time within which to give notice of loss, see note to *Phenix Ins. Co. v. Pickel*, 12 Am. St. Rep. 404, which also shows that where the facts are not indisputed, what constitutes a reasonable time is a question of law for the court: Compare *Harnden v. Milwaukee etc. Ins. Co.*, 164 Mass. 382; 49 Am. St. Rep. 467. Where a contract of insurance requires "immediate" notice to the insurer of any loss insured against, a delay of eleven days is not a compliance with the contract, and, where no reasonable excuse is given for such delay, the insurer is discharged from liability: *Trask v. State etc. Ins. Co.*, 29 Pa. St. 198; 72 Am. Dec. 622. An insurer, by receiving notice of loss without making objections to its not being given in time, does not thereby waive such notice: *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74. Agents of insurers, possessing limited power to solicit insurance, deliver policies, and receive premiums, cannot waive condi-

Losses and forfeitures: *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; 48 Am. St. Rep. 454. Hence, a local agent, having only such power, cannot waive a statement of loss: *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144. On the other hand, it has been held that an insurance agent authorized to take risks and to issue policies has authority to waive, by parol, a condition in a policy issued by him: *Note to German Ins. Co. v. Heiduk*, 27 Am. St. Rep. 412; and that the delivery of proofs to a local agent constitutes a delivery to the company, under some circumstances, especially where he has apparent authority by custom to receive such proofs: *Harnden v. Milwaukee etc. Ins. Co.*, 164 Mass. 382; 49 Am. St. Rep. 467.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

GEER v. MISSOURI LUMBER AND MINING COMPANY.

[124 MISSOURI, 85.]

DEEDS—RECORD OF AS NOTICE—DESTRUCTION OF RECORD.—Under a statute providing that deeds duly acknowledged, certified, and recorded, shall, from the time of filing “with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice, the recording of a deed is notice, although the record thereof is afterward destroyed. A purchaser at tax sale against the apparent owner is not protected against the real owner, the record of whose deed has been destroyed.

IDEM SONANS—TAX SALE.—The names “Lane” and “Leane” are not idem sonans, and a tax sale against Lane does not affect the interest of Leane.

DEEDS—RECORD OF IN ONE COUNTY AS NOTICE IN ANOTHER COUNTY.—The record of a deed in one county, where the land is situated at the time when the record is made, is constructive notice to a subsequent purchaser after the land has been attached to another county, though no record of the conveyance has been made in that county.

DEEDS—ACKNOWLEDGMENT—NOTICE.—Under the Missouri statute, an unacknowledged deed which has been recorded one year prior to 1887, is made to impart notice to all persons of its contents, and all subsequent purchasers are deemed to purchase with notice thereof.

DEEDS—PROOF OF EXECUTION—PRESUMPTION OF GENUINENESS.—A deed dated more than thirty years before its introduction in evidence, and which has been recorded about twenty-four years, and is in the possession of the party claiming title through it, is presumed to be genuine though it contains no acknowledgment, if there is nothing suspicious about it.

DEEDS—IDENTITY OF NAME AND PERSON.—If the name of a grantor in a deed and in the patent to land is the same, and the land conveyed is identical, the proof of identity of person is prima facie sufficient, though the residence recited in the patent is different from that recited in the deed.

EVIDENCE.—**PHOTO-LITHOGRAPHIC COPIES** of a party's signature, the originals of which cannot be produced, are not admissible to prove the genuineness of a signature purporting to be that of the same person, in the absence of preliminary proof that such copies are exact and accurate in all respects, and the affidavit of the custodian of the originals that such copies are a true and literal exemplification of the originals is not sufficient.

L. B. Woodside, for the appellants.

Dinning & Byrns, for the respondents.

90 **MACFARLANE, J.** This is an action of ejectment to recover the following land situate in Shannon county: North half, section 8, township 26, range 3; east half, section 29, township 26, range 3; west half, section 9, township 26, range 3; east half, section 25, township 26, range 3; southeast quarter, section 8, township 26, range 3.

Plaintiffs claim title under deeds made by the sheriff of said county in 1881, under judgments for taxes. Defendants claim under deeds from the patentees of the land to one Auld. These last-named deeds were dated in the sixties, and were recorded in Shannon county in 1870. It seems that after this the records of the county were burned and the deeds were not re-recorded until after the tax sales under which plaintiffs claim.

The suits for taxes upon three of those tracts were against the original patentees. The other two suits were against grantees of the patentees, under deeds ⁹¹ prior in date to those made to Auld, but one of them was recorded in Oregon instead of Shannon county, and the other was not recorded until after the deed to Auld to the same land had been recorded. Neither Auld nor his grantees were made parties to any of these suits. The township in which these lands were situated was formerly a part of Oregon county, but was detached therefrom and was added to Shannon county before the deeds under which plaintiffs claim were recorded.

Plaintiffs undertook to show that the deeds from the patentees to Auld under which defendants claim were forgeries. The papers offered in evidence from which to make comparisons with the signatures to the deeds were rejected by the court.

Plaintiff asked several instructions which were refused, and the court gave one at the request of defendants to the effect that under the pleadings and evidence the verdict should be for them. The judgment was for defendants and plaintiffs appealed. Other facts necessary to an understanding of the questions discussed will appear in the opinion.

1. As shown in the statement, the suits for taxes due upon three of the tracts of land were prosecuted against the original patentees. These patentees had previously conveyed the land to defendant's grantors by deeds which had been duly recorded in Shannon county, but prior to the institution of the tax suit the records of the county, including those containing a record of these deeds, were destroyed by fire, and the record had not been restored or the deeds re-recorded. So, when the suits were commenced, there was no existing record of a conveyance from the parties, who were made defendants. On this state of facts plaintiffs asked the court to give this declaration of law: ⁹² "2. The court instructs the jury that, in bringing suits for taxes, the collector was not required to make parties defendant any person whose deed had been recorded prior to said suit, if the record thereof was destroyed at the time of bringing the same, and had not been supplied or re-recorded at the time of said suit." The refusal of this instruction is assigned as error.

Plaintiffs concede that the exact point was ruled against them in *Crane v. Dameron*, 98 Mo. 568, but they say the ruling absolutely "enables holders of land in those counties where the records have been destroyed to perpetually evade the payment of taxes," and should not, therefore, be followed.

This argument would doubtless have much force if addressed to the legislature with a view of securing an appropriate amendment to the law, but the courts can only interpret and apply the law as they find it. No provision is made under the revenue law for enforcing the payment of taxes, except against the owner, or, if unknown, the one who is presumed to be the owner under the provisions of the registry laws of the state. The statute provides that deeds duly acknowledged, certified, and recorded "shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice." These grantees had their deeds duly recorded, and the collectors and purchasers at tax sales are conclusively presumed to have had notice thereof. Any conclusion other than that reached in *Crane v. Dameron*, 98 Mo. 568, would nullify these provisions of the registry act.

2. The patent to one tract of the land gave the name of Michael Leane as the grantee. The deed under which defendant claims from the patentee is ⁹³ signed by Michael Leone, and the tax proceeding was against Michael Lane. Plaintiffs insist that the identity of the patentee and the grantor was not sufficiently

established to authorize the admission of the deed as evidence of a conveyance from the original purchaser from the United States. In answer, defendants say that the name "Lane," is not idem sonans with the name "Leane," and the judgment and sheriff's deed are insufficient to pass the title of Michael Leane.

We are of the opinion that defendants are right, and that the names Leane and Lane do not have such a similarity of sound when pronounced that a difference would not be observed by an attentive ear. The vowels e-a before the consonant n, is generally given the sound of e long or e-e, as dean, and lean, when used as an adjective or a verb. Leen and Lane do not sound at all alike, and it was not shown that by common usage a different pronunciation is given the word "Leane" when used as a proper name. The addition of the letter e to the word "lean," would not change the sound ordinarily given to the letters ea in lean.

The sheriff's deed only conveyed the interest in the land held by the defendants in the suit, and the interest of Michael Leane therein was not affected by the judgment, sale, and deed: *Whelen v. Weaver*, 93 Mo. 432.

3. One tract of land was entered by one William B. Annis. During the time the land was located in Oregon county the patentee conveyed it to Pettijohn, and the latter conveyed it to L. G. Marshall against whom the tax suit was prosecuted. After the township including this land had been transferred to Shannon county the deeds were recorded in Oregon county. They were not recorded in Shannon county. The deed from Annis to Auld, under which defendants claim title, while subsequent in date to the one to Pettijohn, was recorded in Shannon county in 1870. A record ⁹⁴ of the deed in Oregon county when the land was located in Shannon county imparted no constructive notice thereof to subsequent purchasers from Annis, and Auld having no actual notice of the conveyance to Pettijohn acquired the title of the grantor as against the prior deed: *Gwynn v. Frazier*, 33 Mo. 90.

But it appears that the commission as notary public of the person who took the acknowledgment of the deed from Annis to Auld had previously expired, and it is insisted that the deed was not properly acknowledged and certified, and was, therefore, improperly recorded, and was not admissible in evidence without proof of execution.

The acknowledgment of a deed is not necessary to its validity. It only dispenses with the proof of execution, and entitles the deed to go upon the record.

The want of acknowledgment in these particulars is cured by

the statute. An unacknowledged deed, which has in fact been recorded one year prior to 1887, is made to impart notice to all persons of its contents and all subsequent purchasers are deemed to purchase with notice thereof: Rev. Stats. 1879, sec. 2305; Laws 1887, p. 183; Rev. Stats. 1889, sec. 4864.

The deed from Annis to Auld was recorded in 1870, and by the terms of the statute imparted notice to subsequent purchasers. The deed was dated July 2, 1863, which was more than thirty years before its introduction in evidence. It had been recorded about twenty-four years and was in the custody of defendant who claims title through it under Auld. No objection was made to its introduction in evidence, without proof of its execution, and there appeared to be nothing suspicious about it. In the circumstances we should presume the deed to be genuine: *Long v. McDow*, 87 Mo. 201.

4. One tract of the land was entered by James Beard, who, as shown by the patent, was a resident of St. Louis county. On April 18, 1861, he conveyed to Anderson, and the deed was recorded in 1873. Anderson conveyed to Onions, who was made a defendant in the tax proceedings. Defendant claims through a deed from James Beard to Auld, which was dated July 10, 1861, and recorded in 1870. In this deed the residence of Beard is given as of Sterling, Illinois. It is now insisted that, on account of the difference in residence, the deed to Auld was not prima facie evidence of the identity of the grantor and the patentee.

We do not think there is any force in this contention. The name of the grantee under the patent and of the grantor in the deed to Auld are the same, and the land conveyed in the patent and the deed is identical. The residences of persons are often changed, and a declaration thereof in a deed might be entirely omitted, without affecting in the least its authenticity. After the lapse of thirty years, it might be and often would be impossible to prove the identity of the grantor with grantee in a former deed. We think, therefore, the practical rule should be that when the names of the grantor and grantee are the same and the land conveyed is identical, the proof of identity is prima facie sufficient: *Mosely v. Reily*, 126 Mo. 129.

5. In order to defeat defendant's title, plaintiff undertook to prove that the deeds read in evidence, purporting to have been made by the patentees to Martin C. Auld, were in fact forgeries.

The entries of these lands were made under the graduation act

of Congress for actual settlement and occupation. In order to make the entry, it was necessary for the applicant to file with the register of lands an affidavit that the entry was made for actual settlement ⁹⁶ and cultivation. These affidavits are now on file in the department of the interior at Washington City.

In order to establish a standard for comparing the handwriting of the grantors in the deeds to Auld with the true handwriting of the patentees, plaintiffs offered in evidence photo-lithographic copies of these affidavits, with the signatures of affiants thereto. To these copies were attached the certificate of the commissioner of the general land office as follows:

“Department of the Interior.

“General Land Office.

“Washington, D. C., January 19, 1894.

“I, S. W. Lamoreux, commissioner of the general land office, do hereby certify that the annexed photo-lithographic copy of the affidavit of Michael Leane, same size as the original, filed with Jackson, Missouri, cash entry, No. 32881, is a true and literal exemplification of the original on file in this office.

“In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, the day and year above written.

[Seal]

“S. W. LAMOREUX,
Commissioner of the General Land Office.”

On objection by defendants, these copies were held inadmissible for the purpose for which they were offered.

It is well-settled law in this state that writings can only be used as standards with which to compare a disputed handwriting when no collateral issue can be raised in respect to their genuineness. They are generally allowed only when admitted to be genuine, or when their genuineness is established in the cause: *Rose v. First Nat. Bank*, 91 Mo. 402; 60 Am. Rep. 258; *Randolph v. Loughlin*, 48 N. Y. 456.

⁹⁷ Ordinarily, the original itself is used, and it has been held that copies, either by tracing or produced by a press or machine, however correct they may be, cannot be used as standards: *Commonwealth v. Eastman*, 1 Cush. 189; 48 Am. Dec. 596; *Spottiswood v. Weir*, 66 Cal. 529; *Cohen v. Teller*, 93 Pa. St. 128.

But it is said that the original affidavit was on file in the interior department at Washington, and could not be produced at the trial, and the art of photography and lithographing is so perfect

that a photo-lithographic copy of the writing is an exact representation of the original, and should be admitted from the necessity of the case.

It is unquestioned that a very close imitation of an object can be obtained by photography, but it is not a fact of which judicial knowledge may be taken that "all the appearances of a written document are capable of such exact reproduction that the copy will fully represent the original": *Maclean v. Scripps*, 52 Mich. 219.

Without determining whether such a copy, the original of which would be admissible as a standard, and could not be produced, could be substituted, we are satisfied that it could not be done unless preliminary proof was first made that the copy was exact and accurate in all respects. There was no such proof as preliminary to the introduction of this copy. The officer merely certifies that the copy is of the same size and "is a true and literal exemplification of the original." This certificate might have been made to a written copy as well as to this one.

The perfection of a photograph depends upon many circumstances and conditions, such as skill of the operator, the correctness of the lenses, "the purity of the chemicals, the accuracy of the focusing, the angle at which the original to be copied was inclined to the ^{ss} sensitive plate, etc.": *Taylor Will Case*, 10 Abb. Pr., N. S., 300.

The slightest defect or imperfection in the photography or lithographing would destroy the sufficiency of the copy as a standard for the comparison. Opinions are often formed on the slightest strokes of the pen or the most delicate shading of the letters. "The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there was no proof here of the manner and exactness of the photographic method used": *Hynes v. McDermott*, 82 N. Y. 51; 37 Am. Rep. 538.

The court did not err in excluding the copies as standards of comparison.

Finding no error in the record the judgment is affirmed.

Brace, C. J., and Robinson, J., concur.

Barclay, J., concurs in all paragraphs except two and concurs in the result.

DEEDS—DESTRUCTION OF RECORD OF.—The destruction of a record of a deed does not impair the effect of such record as notice

to subsequent purchasers and encumbrancers: *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464, and note.

DEEDS—RECORD OF—CHANGE OF COUNTY BOUNDARIES, EFFECT OF.—The change of county boundaries does not impose the duty of recording conveyances of such lands as are under the new boundaries thrown into different counties from the one of which they originally formed a part: *Koerper v. St. Paul etc. Ry. Co.*, 40 Minn. 132.

SIGNATURE—EVIDENCE—PHOTOGRAPHIC COPIES.—Photographic copies are admissible in evidence when they are proved to be exact reproductions of the original: *Eborn v. Zimpleman*, 47 Tex. 503; 26 Am. St. Rep. 315, and extended note. Such copies are not admissible when the originals can be had: *Maclean v. Scripps*, 52 Mich. 214; or when not proved to be an exact reproduction: *Houston v. Blythe*, 60 Tex. 508. A witness cannot be allowed to give his opinion as an expert on a question of disputed handwriting, founded on a comparison of the disputed signature with photographic copies of other writings not in evidence, and the accuracy of which is not shown by extrinsic testimony: *Hynes v. McDermott*, 82 N. Y. 41; 37 Am. Rep. 538.

GAY v. MURPHY.

[124 MISSOURI, 98.]

BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—An official or statutory bond, whether joint or several, in which the name of the principal is called for and which is not signed by him, is not only void as to him, but is prima facie void as to all who sign it as sureties; and, to hold them liable, the obligee in the bond has the burden of proof to show that they consented to be bound without the signature of the principal.

BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—A joint and several bond given by a contractor reciting that it is executed by him as principal and others as sureties contains an implied promise that it shall be signed by the principal before delivery to the obligee, and, if not so signed, it is prima facie void as to the sureties, and the burden of proof is on the obligee to show that the sureties consented to be bound without the signature of the principal.

BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—An official or statutory bond not signed by the principal, when purporting to be executed by him, is prima facie invalid as to the sureties. The presumption is, that each one of the sureties signed the bond upon the understanding that the others named as obligors, and especially the principal, would sign it.

H. A. Clover, Jr., and J. H. Zumbalen, for the appellant.

M. Kinealy and J. R. Kinealy, for the respondent.

¹⁰¹ **BURGESS, J.** Action to recover of defendants, as sureties of Andrew G. Wallin, damages aggregating the sum of six thousand three hundred and seventy-three dollars and fourteen cents, for breaches of a building bond. The penalty of the bond is ten thousand dollars. It was never signed by the principal, Wallin. It reads as follows:

"Know all men by these presents, that Andrew G. Wallin, of the city of St. Louis, Missouri, as principal, and P. C. Murphy, L. A. Bowlin, and Charles Green, as securities, are jointly and severally held and firmly bound unto Taafe & Gay, of the city of St. Louis, Missouri, in the sum of ten thousand (\$10,000) dollars, lawful money of the United States of America, well and truly to be paid to the said Taafe & Gay, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and signed with our hands, this thirtieth day of April, in the year of our Lord eighteen hundred and ninety.

The condition of the above obligation is such, that whereas, the said Andrew G. Wallin, principal, has, on the day of the date of these presents, executed and entered into a certain contract for the erection of certain buildings in said contract described, which contract is hereto annexed; now, if the said Andrew G. Wallin shall well and truly perform and fulfill all and every the covenants, conditions, stipulations, and agreements in said contract mentioned to be performed and fulfilled, and shall keep the said Taafe & Gay, owners, harmless and indemnified from and against all and every claim, demand, judgments, liens, and ¹⁰² mechanics' liens, costs and fees of every description, incurred in suits or otherwise, that may be had against them or against the buildings to be erected under said contract, and shall repay the said Taafe & Gay all sums of money which they may pay to other persons on account of work and labor done or materials furnished on or for said buildings, and if the said Andrew G. Wallin shall pay to the said Taafe & Gay all damages they may sustain, and all forfeitures to which they may be entitled by reason of the nonperformance or malperformance on the part of said Andrew G. Wallin of any of the covenants, conditions, stipulations, and agreements of said contract, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

"Witness our hands and seals.

"P. C. MURPHY,

[Seal]

"L. A. BOWLIN,

[Seal]

"CHAS. GREEN,

[Seal]

"_____.

[Seal]"

The petition alleges the partnership between Taafe & Gay, the death of Taafe and the granting of letters of administration to

plaintiff as surviving partner on the partnership estate; that said firm and Andrew G. Wallin entered into a written contract, whereby said Wallin agreed to erect and complete for said firm a row of five ten-room brick houses, according to certain plans and specifications, for the sum of twenty-one thousand two hundred and eighty-five dollars, to be paid in installments as the work progressed. The petition then set forth certain covenants in said contract, and properly assigns breaches thereof, as well also as breaches of the bond.

The answer is: 1. A general denial, except as to matters thereafter admitted; 2. A special plea of non est factum, denying the delivery of said bond by the defendants, or either of them, to the plaintiff, and ¹⁰³ averring that the bond was received by the obligees with knowledge and notice that it was not the obligation of the defendants, in that it was not executed by the principal therein named, and in that neither of said defendants agreed or consented to the delivery thereof to the plaintiff without the signature of the principal therein named. The answer was verified by affidavit.

The reply admits that the principal did not sign or execute said bond, and denies the affirmative averments in the answer. The case was referred to A. N. Crane, Esq., to try the issues.

Defendants admitted that all the signatures to said bond and contract are the genuine signatures of the parties thereto, but objected to the admission of the bond in evidence, on the ground that said bond is not regular or complete on its face, inasmuch as it described Andrew G. Wallin as principal, and is not signed by him, and it does not appear that the defendants, who signed as securities for Wallin, consented to be bound without the signature of said principal.

The contract was objected to as irrelevant and immaterial because the suit is on the bond. Said objections were sustained by the referee, and the plaintiff excepted to said ruling. The plaintiff, being unable to proceed further because of said ruling, took a nonsuit with leave, and, after an unsuccessful motion to set aside the nonsuit and for a new trial, he appealed.

The correctness of the referee's ruling sustaining defendant's objection to the admission in evidence of said bond and the building contract therein referred to, is the only question presented by this record.

At the hearing before the referee, defendants admitted signing

the bond, but denied its delivery, or that any person was authorized to deliver it for them ¹⁰⁴ until it had been signed by the principal therein named.

It is contended by plaintiff that the bond is *prima facie* valid and binding on those who signed it, though not signed by the principal, and, as it is found in the possession of the obligees, if for any reason defendants are not bound, the burden of showing that they are not rests upon them.

Upon these questions the authorities are in much conflict, and irreconcilable. The following authorities hold that an official bond, or a bond required by statute, not signed by the principal, when purporting to be executed by him, is *prima facie* invalid as to the sureties: *Bunn v. Jetmore*, 70 Mo. 228; 35 Am. Rep. 425; *Sacramento v. Dunlap*, 14 Cal. 421; *Johnston v. Kimball Township*, 39 Mich. 187; 33 Am. Rep. 372; *Wood v. Washburn*, 2 Pick. 24; *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665; *Goodyear etc. Co. v. Bacon*, 151 Mass. 460; *Green v. Kindy*, 43 Mich. 279; *Ferry v. Burchard*, 21 Conn. 597; *Curtis v. Moss*, 2 Rob. (La.) 367; *State v. Austin*, 35 Minn. 51; *Board of Education v. Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767; *Bean v. Parker*, 17 Mass. 591; *Martin v. Hornsby*, 55 Minn. 187; 43 Am. St. Rep. 487.

Under such circumstances, the presumption is, that each one of the sureties signed the bond upon the understanding that the others named as obligors, and especially the principal, would also sign it: *Johnston v. Kimball Township*, 39 Mich. 187; 33 Am. Rep. 372; *Wells v. Dill*, 1 Mart., N. S., 592.

In *Sacramento v. Dunlap*, 14 Cal. 421, the court, speaking through Justice Field, said: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Someone must have written ¹⁰⁵ his signature first, but, it is to be presumed, upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete, and without binding obligation upon either."

It is also said in that case that "the instrument in this case is, in form, a joint bond only, and not joint and several, and, in this respect, differs materially from the bonds in the cases of *Parker v. Bradley*, 2 Hill, 584, *Cutter v. Whittemore*, 10 Mass. 442, and *State v. Bowman*, 10 Ohio, 445."

But in *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, which was also a suit on a joint bond, the court cites with approval *Bean v. Parker*, 17 Mass. 591, and *Wood v. Washburn*, 2 Pick. 24.

The bond under consideration is like the bonds in *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425, and *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665, joint and several; but as was said in *Board of Education v. Sweeney*, 1 S. Dak. 642, 36 Am. St. Rep. 767, "the decisions are placed upon the broad doctrine that the instrument, as delivered, is an incomplete and imperfect instrument, and is not the contract contemplated by the parties, or that the sureties understood they were making when they affixed their signatures to the instrument."

It was said in *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665, "the instrument is incomplete without the signature of each partner, or proof that the signature affixed [firm name] had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties."

It is held in *Ward v. Churin*, 18 Gratt. 801, 98 Am. Dec. 749, *Williams v. Springs*, 7 Ired. 384, *Blume v. Bowman*, 2 Ired. 338, *Chandler v. Temple*, 4 Cush. 285, and *Grim v. School Directors*, 51 Pa. St. 220, that the possession ¹⁰⁶ of such a bond by the obligee is prima facie evidence of its delivery by the persons who have signed it, and the burden is on them to show that it was not to be delivered until signed by the principal.

As holding that such a bond when joint and several is binding on all who sign it may be cited, *Loew v. Stocker*, 68 Pa. St. 226; *Woodman v. Calkins*, 13 Mont. 363; 40 Am. St. Rep. 449; *Miller v. Tunis*, 10 U. C. C. P. 423; *State v. Bowman*, 10 Ohio, 445; *Johnson v. Johnson*, 31 Ohio St. 131; *Douglas Co. v. Bardon*, 79 Wis. 641; *Trustees v. Sheik*, 119 Ill. 579; 59 Am. Rep. 830; *State v. Peck*, 53 Me. 284; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Cooper v. Evans*, 36 L. J. Ch. 431.

With respect to official and other statutory bonds, which are in the one instance required by statute to be executed by the officer, and in the other to be given by the principal in the bond, the weight of authority is in accord with the ruling of this court in *Bunn v. Jetmore*, 70 Mo. 228; 35 Am. Rep. 425; that is, if the name of the principal is called for in the bond, and it is not signed by him, it is not only void as to him, but as to all who sign it as sureties. And it makes no difference whether it be in form

joint or several, and, if the obligee would hold them liable on it, he must show that they consented to be bound without the signature of the principal. When there is no principal in such case, there is no surety.

The rule is different when the bond is signed by the principal, and is not signed by one of the sureties named in the bond. In such circumstances, the bond is *prima facie* binding on all who sign it. And if those who sign it would avoid responsibility thereon the burden rests upon them of showing that at the time of its execution it was agreed that the bond should not be delivered as their deed until all persons named in the bond as sureties had executed it: *State v. Sandusky*, 46 Mo. 377; *Grim v. School Directors*, 51 Pa. St. 107 220; *Blume v. Bowman*, 2 Ired. 338; *Ward v. Churn*, 18 Gratt. 801; 98 Am. Dec. 749; *Towns v. Kellett*, 11 Ga. 286; *Chandler v. Temple*, 4 Cush. 285; *Union Bank v. Ridgely*, 1 Harr. & G. 324; *Pawling v. United States*, 4 Cranch, 219; *Fletcher v. Austin*, 11 Vt. 447; 34 Am. Dec. 698; *Whitaker v. Richards*, 134 Pa. St. 191; 19 Am. St. Rep. 684.

In *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, after an able and elaborate review of all the authorities, Sherwood, J., writing the opinion of the court, held that an agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another is procured as a cosurety will not relieve the surety of his liability on the bond, although the cosurety is not obtained, where there is nothing on the face of the bond, or in attending circumstances, to apprise the taker that such further signature was called for in order to complete the instrument: See, also, *Dair v. United States*, 16 Wall. 1; *State v. Baker*, 64 Mo. 167; 27 Am. Rep. 214; *State v. Modrel*, 69 Mo. 152; *State v. Hewitt*, 72 Mo. 603; *Wolff v. Schaeffer*, 74 Mo. 154.

If, then, the bond sued on, being, as we hold, a common-law bond (*State v. Thompson*, 49 Mo. 188), is to be governed by the same rules of law that official and statutory bonds are, it is *prima facie* invalid, and the referee did not err in sustaining the objection to its admission in evidence.

And it makes no possible difference, we think, that it is a joint and several bond, as under the Missouri statute (Rev. Stats. 1889, sec. 2384), all contracts which by the common law are joint only are to be construed to be joint and several; and while such a distinction has been made by courts of high authority (*Sacramento v. Dunlap*, 14 Cal. 421; *Parker v. Bradley*, 2 Hill, 584; *Cutter v. Whittemore*, 10 Mass.* 442; *State v. Bowman*, 10 Ohio, 445; 108

Kurtz v. Forquer, 94 Cal. 91), it has never been made by this court.

The authorities cited on the question of the invalidity of an official or statutory bond, not signed by the principal named in such a bond, make no distinction between that class of bonds and a common-law bond; but there are authorities which make such a distinction (State v. Bowman, 10 Ohio, 445), a principle which we do not controvert, when the bond shows that it is the intention of the sureties to bind themselves regardless of the fact whether the principal signs it or not.

Nothing of the kind appears from the bond in this case. On the contrary, it plainly shows that it was to be signed by the principal in order to make it a complete instrument. By the insertion of his name in the bond as principal there was an implied promise to the sureties that this would be done before it was delivered, and the obligees could not shut their eyes to its imperfect execution thus patent, and hold the sureties liable on the bond without showing by evidence that they intended to be bound in the condition that it was in when they signed it in any event, whether signed by the principal or not.

As it logically follows from the conclusion reached that the judgment must be affirmed, it becomes unnecessary to pass upon other questions raised by defendants. The judgment is affirmed.

Gantt, P. J., and Sherwood, J., concur.

BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—An official bond in which the officer is named as principal, but which is not executed by him, is prima facie invalid, and not binding upon the sureties named therein: Board of Education v. Sweeney, 1 S. Dak. 642; 36 Am. St. Rep. 767, and note. Failure of a principal to sign his official bond conditioned for the faithful performance of his official duty does not render it void nor release the surety from liability thereon: City of Deering v. Moore, 86 Me. 181; 41 Am. St. Rep. 584.

STATE v. BOARD OF PRESIDENT AND DIRECTORS.

[134 MISSOURI, 296.]

MANDAMUS—SCHOOL ELECTION.—Mandamus is properly brought in the name of the state on the relation of taxpayers residing in a school district to compel its board of directors to rescind appointments of judges and clerks made by it for an election of a member of such board to be held thereafter.

MANDAMUS TO CONTROL DISCRETION.—IF THE FACTS are undisputed, or stand confessed by the pleadings, and it appears to the court having superintending jurisdiction over an inferior court, tribunal, or corporation, that such court or corporation has arbitrarily abused the discretion confided to it by the law, or its charter, and no other adequate remedy is open, the superior court, by a writ of mandamus, may control such inferior tribunal or corporation, so as to correct such abuse and compel it to so exercise its discretion as to conform to lawful and just methods of procedure.

MANDAMUS TO CONTROL DISCRETION.—While mandamus does not generally lie to control the discretion of an inferior tribunal in whom a discretion is vested in the performance or non-performance of certain duties devolved upon it by law, yet, if such discretionary power is exercised with manifest injustice, such abuse may be controlled by mandamus.

MANDAMUS TO CONTROL DISCRETION.—ELECTION OF SCHOOL DIRECTOR.—If a board of school directors is guilty of gross abuse of discretion in selecting, for purely partisan purposes, judges and clerks from the same political party to conduct an election of members of such school board, and arbitrarily refuses to select election officers from different political parties, the supreme court may, by mandamus, compel such board to rescind the selection of election officers so made, and to select them from the different political parties.

C. T. Noland and Houghton & Browning, for the relators.

C. B. Starke and Rowell & Ferriss, for the respondents.

297 GANTT, P. J. This is an original proceeding commenced in this court on the twenty-seventh day of April, to obtain a peremptory writ of mandamus, directed to the board of president and directors of the St. Louis public schools, and certain members of said board constituting the "election committee" of said board, requiring said board and the individual members named in the application to set aside certain appointments of judges and clerks made by said election committee on April 18, 1896, for the election of a member of said board on the fifth day of May, 1896.

The alternative writ issued, returnable April 30, 1896, and an order made shortening the time for taking proofs in support of the alternative writ. On the return day the respondents joined in a motion to quash the writ and in a joint return.

Inasmuch as the election was appointed for the 5th of May,

and if the relief sought should be granted it was necessary the writ should issue promptly, if at all, upon due consideration, we directed the writ to issue prior to filing of an opinion.

The petition substantially alleges that the relators, John P. Kelleher and John F. Ryan, are resident taxpayers and citizens of the city of St. Louis, and reside in the tenth district as laid off and constituted for the election of a district director of the said board. That said board is a public corporation created and existing by virtue of the laws of this state for the management of the public schools of the city of St. Louis, and among other powers conferred upon it is the power ²⁹⁸ "to prescribe the time, place, and manner of conducting the elections of members of said board"; that said board now consists of thirteen district directors and seven directors at large; that a vacancy exists in said board as to the district director from the tenth school district of said city; that a full board consists of twenty-one directors; that the individual respondents constitute a majority of said board at present, and have confederated together to manage and control the affairs of said corporation in their own interests and in the interest of the republican party, in utter disregard of the rights of others, and of the best interest of the public schools; that said Bus is president of said board and that respondents Lacey, Koenig, Godfrey, Landvogt, and Rebenack constitute a majority as against two other members of the committee of said board which has been appointed and has control of elections to said board, and that of this committee Messrs. Landvogt, Koenig, and Rebenack are a subcommittee, which, together with said committee, have immediate management of the conduct of the election herein mentioned; that said Bus was elected by the present majority and one member since resigned, and said election committee was appointed by said Bus, who has a deciding vote in case of a tie.

It was further averred that among other rules prescribed for the election of members of said board were the following:

Section 2. Any convention of delegates, or any primary election as hereinafter defined by sections 5 and 6, held for the purpose of making nominations for directors of this board may nominate candidates. Said nominations shall be made by filing of certificate of nomination executed and acknowledged before a notary public with the same formalities as an instrument affecting real estate; the certificate of nomination, which ²⁹⁹ may consist of one or more writings, shall contain the name of the person nominated, his residence and occupation, and also the name and

address of each signed. The certificate may also designate by name the party or principle which such nominee shall represent."

"Section 5. A convention of delegates, within the meaning of above section 2, is a convention of delegates of any organized party which at the last school election for directors, or at the last national, state, or city election, shall have cast at least three per cent of the entire vote cast in the city or district for which the nomination is made.

"Section 6. A primary election, within the meaning of said section 2, is an election held within the city or district, as the case may be, by members of any political party or by the voters of some political faith for the purpose of nominating candidates for directors, provided that the said party shall have cast at least three per cent of the entire vote cast within the city or district for which the nomination is made."

It is further alleged that relator Kelleher has been duly nominated for district director in said board from the said tenth district by a primary election held by the democratic party of said district and his nomination duly certified and filed in accordance with said rules; that the democratic party is an organized political party and cast more than three per cent of all the votes cast at the last school, national, state, and city elections within said district and city; that said Kelleher possesses all the qualifications required by law and the rules of said board for a director in said board; that Charles F. Mertens has likewise been nominated by the republican party of said district for the said vacant directorship.

It is further represented to the court that the object and intent of creating said board was to place the control of the school affairs of said city beyond the ³⁰⁰ denomination of any political party, and to secure for the management thereof men of integrity, ability, honesty, and fair mindedness who would in all cases be guided in their administration of said affairs by the true interests of the people and children of said city and not by the dictation of political party or cliques; that the majority of said board and the election committee, with one exception, are all members of the republican party; that before Messrs. Landvogt, Vordtriede, Spinning, Godfrey, Koenig, and Kessner were nominated by the republican party for their positions in said board they pledged themselves that if elected they would go into a caucus of the republican members of said board and be guided in their action as

members thereof by said caucus, and so shape their conduct as to promote the interests of the republican party.

It is then averred that said subcommittee on elections did on or about the eighteenth day of April, 1896, appoint the judges and clerks for said election to be held on May 5, 1896, and that each and every one of said judges and clerks so appointed, forty-two in number, were strong, professed, and partisan members of the republican party, and that the expressed intent and purpose of said committee in said appointments was to control said election to the last degree in the interest of the republican party and to defeat relator Kelleher.

It further appears from the petition that prior to the appointment of said judges and clerks, said relator Kelleher appeared before said election committee and asked to be heard and to present names of reputable and qualified citizens and voters for appointment as judges and clerks of said election and was refused not only representation among said judges and clerks, but was denied a hearing, and that a committee of highly reputable citizens, irrespective of party affiliations, likewise appeared before said board and were denied the ³⁰¹ right to submit a request for an honest and fair election and for the appointment of impartial judges and clerks or equal distribution of the officers of said election.

The respondents move to quash this writ for the reasons: 1. That it does not set forth facts sufficient to entitle relators to the relief prayed; 2. The law does not make it the duty of the board to appoint judges and clerks of different political parties; 3. There is no law requiring defendants to give relators the relief sought; 4. Mandamus does not lie to revoke an appointment already made.

Reserving their right to a ruling upon their motion to quash, respondents, by leave of the court, filed their return, which admitted the citizenship of relators; their residence in the tenth district; the incorporation of the board; the vacancy of the tenth district; denied that the republican members constituted a majority of the board, and that they are confederated together to control the same in the interest of the republican party; admit that Bus is president, but deny he has deciding vote in case of a tie; admit the rules concerning the nomination of directors as pleaded by relators; admit Kelleher has been duly nominated; deny that a majority of the board are members of the republican party, and a general denial of all the remaining allegations, and

an averment that by virtue of its charter the board has the power to prescribe the time, place, and manner of conducting elections of its members; that under its rules a committee was appointed to select judges and clerks and selected the same and reported them and they were approved by the board; that the judges and clerks were all competent, disinterested men and qualified for their positions and were selected in the customary manner.

The evidence establishes that the board of the ³⁰² president and directors of the St. Louis public schools is a public corporation created by a special act of the general assembly of Missouri, February 13, 1833, and subsequent amendments thereto, including the act of March 31, 1887, fixing the number of directors at twenty-seven to be elected by the city at large and fourteen by districts; that among other powers conferred upon the board is that "prescribing the time, place, and manner of conducting the elections of members of the board"; that some time prior to the fourteenth day of April, 1896, there was a vacancy in the said board by reason of the resignation of the district director of the tenth district; that thereupon a special election was ordered to be held in said district on May 5th to fill said vacancy.

It then appears without contradiction that Henry Bus was and is the president of the St. Louis school board; that the board is composed at present of twenty members, of whom ten are republicans and ten democrats; that the president appoints the committee on elections; that on March 30th he appointed an election committee of seven, of which number Charles G. Penny alone was and is a democrat; that on or about the fifth or sixth day of April, 1896, said election committee held a meeting in the said school board building, and at that time, and before the judges and clerks for the election of May 5th had been appointed, Mr. Hugh Brady, and Robert Rutledge, members of the democratic party, appeared before said election committee as a committee appointed in behalf of the democrats, and asked to have a fair representation in the appointments of clerks and judges to be made, and presented the names of reputable citizens for that purpose, which request was refused, and that thereupon Mr. Landvogt, a republican member of said committee, presented a list of judges and clerks, all of whom were and are republicans, ³⁰³ for appointment. Mr. Penny objected to making all the appointments from the republican party but the committee adopted the list. Thereupon Messrs. Brady and Rutledge requested the privilege of one challenger at each precinct, and this was also refused.

It also appears without question that, after these judges and clerks were appointed, a committee of citizens appeared before the board, and, through Mr. Arthur Lee, requested the privilege of addressing the board in the interest of obtaining a fair representation for the democrats in the judges for the election on May 5th, and this, on motion of Mr. Grawe, another republican, was also refused.

It is further shown by the evidence that on the 15th of February, 1896, a convention of the republican party was held at Harmony Hall, Eighteenth and Olive streets, for the nomination of directors at large for the school board; that at that meeting Messrs. Landvogt, Koenig, Spinning, Godfrey, Lacey, and Rebenack were nominated; that prior to their nominations a resolution was adopted in these words: "Resolved, that all candidates nominated at this convention be instructed to enter a caucus of the republican members of the school board, and be guided by the decision of the caucus in the matters pertaining to the shaping of the public school system in accordance with republican principles, and candidates accepting nominations of this convention so pledge themselves."

When the election committee were considering whether they would allow democrats representation, Mr. Koenig, a republican member, said it was a republican committee, and, so far as he was concerned, he would not give the democrats representation either as judges, clerks, or challengers.

The evidence also tended to show that this was the ~~3rd~~ first time a delegation of citizens was ever denied a hearing by the board, and that the board had never before failed to give both political parties representation in the appointment of judges and clerks.

It further appears that the tenth school district is composed of the sixteenth and twenty-fourth wards of the city of St. Louis; that the official returns in said wards in 1892 gave O'Neill, democrat, two thousand four hundred and twenty-nine, and Joy, republican, two thousand two hundred and eighty-seven votes for Congress, and in 1894 the same district gave Espenchild, democrat, two thousand three hundred and twenty-seven; Joy, republican, two thousand four hundred and ten votes.

1. This action is properly brought in the name of the state to the use of relators, who are both citizens and taxpayers of the tenth school election district in which the proposed election is to be held: State v. Hoblitzelle, 85 Mo. 620, concurring opinion of

Sherwood, J.; *State v. Hannibal etc. R. R. Co.*, 86 Mo. 13; *State v. Francis*, 95 Mo. 44; *State v. St. Louis School Board*, 131 Mo. 505.

2. Granting, however, the right of relators to invoke mandamus, if the writ is allowable at all, it remains to meet the objection of respondents that such a remedy is not open to relators under the averments of the alternative writ and the facts disclosed in evidence, for the reason that mandamus does not lie to revoke the appointments already made nor revise the action of the board, however arbitrary. This is the vital point in this case and, summed up in a word, is this: Where the facts are undisputed, or stand confessed by the pleadings, and it appears to the court having superintending jurisdiction over an inferior court, tribunal, or corporation that such court or corporation has arbitrarily abused the discretion confided to it by the ³⁰⁵ law, or its charter, and no other adequate remedy is open to the aggrieved party, can this court, by its writ of mandamus, control such inferior tribunal or corporation so as to correct such abuse and compel it to exercise its discretion so as to conform to lawful and just methods of procedure.

By this motion to quash, as well as by wholly failing to controvert any of the facts shown by relators in evidence, this case stands as upon demurrer with the facts conceded, and their sufficiency in law alone challenged.

The ordinary function of this extraordinary original writ at common law is familiar. It is a command, in the name of the state, directed to some tribunal, corporation, or public officer, requiring it or him to do some specific act or particular thing in the writ specified which the court has previously determined that it is the duty of such tribunal, corporation, or officer to perform. Whether we treat the board as a single legal entity, or its directors as public officers, no doubt can exist that it is a body to whom the writ may issue according to established legal principles; it is quite as obvious that unless this writ is available relators are without an adequate remedy to obtain a fair election.

Recurring, then, to the main contention, that the board of directors having once made a list of appointments its action is not subject to be revised by a writ of mandamus from this court, however great the abuse of the discretion confided to it, or however arbitrary its conduct under the circumstances, let us inquire if such indeed is the law of the land.

While it is generally true that mandamus will not lie to control the discretion of an inferior tribunal in whom a discretion is vest-

ed in the performance or nonperformance of certain duties devolved upon it by law, it is well settled that if the discretionary power is exercised ³⁰⁶ with manifest injustice, the courts are not precluded from commanding its due exercise. Such an abuse of discretion is controllable by mandamus.

Thus in *Illinois State Board etc. v. People*, 123 Ill. 227, it was held that while the state board of dental examiners has the right to decide whether the college at which an applicant for license graduated was a reputable college or not, it must decide that question upon just and fair principles, and not upon motives of self-interest to crush out a rival college to the one in which its members are interested as members of its faculty; the court holding, in effect, that a public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law, and that in such case mandamus is an appropriate remedy.

In *Glencoe v. People*, 78 Ill. 382, the same learned court said: "The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by mandamus": *Arberry v. Beavers*, 6 Tex. 472; 55 Am. Dec. 791; *Commissioners of Poor v. Lynah*, 2 McCord, 170.

The supreme court of New York in *People v. Superior Court*, 5 Wend. 114, discussing the jurisdiction of the court, say: "The jurisdiction of this court by mandamus is one of immense importance and extent. . . . It extends to all inferior courts and tribunals," and, in controlling their discretion, it is said: "The security of the citizen is essentially increased ³⁰⁷ whenever the territory of undefined discretion . . . is circumscribed by the establishment of well-defined and clear principles." A statement of the law approved and indorsed by this court in *Fretwell v. Laffoon*, 77 Mo. 26.

In *State v. State Board of Health*, 103 Mo. 22, this court adopt in the following words the limitation of the general rule as announced in *Illinois State Board etc. v. People*, 123 Ill. 227: "There are some limitations upon the rule just stated; for, if the board of health should exercise its powers with manifest injustice,

then the courts may, and will, control the abuse of authority by the writ of mandamus."

These authorities sufficiently indicate that when an inferior tribunal or official body, charged with the performance of a duty involving a discretion in the exercise thereof, is guilty of a gross and palpable violation of the discretion confided to it, this court, in the exercise of the superintending control conferred by the constitution of the state, will control the inferior tribunal by its writ of mandamus, especially if the right violated pertains to the public. This court has as extensive powers and duties in this respect as the court of king's bench in England. As was said in Strong's case, 20 Pick. 495, "in every well constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them—in the former case by writ of error, in the latter by mandamus. . . . It not only lies to ministerial, but to judicial officers."

It was urged in argument by learned counsel for respondents that the relators had no legal right to demand that the board should appoint democratic ³⁰⁸ judges. Stated in this form, possibly not, but they did have, and do have, the legal right to protest against the appointment of a purely partisan set of republican judges and clerks for partisan purposes. No defense of this arbitrary and unprecedented action of the board was attempted, save and alone that the law gave the board the power to make such appointments, and the courts were powerless to correct or indeed revise their arbitrary action.

To this construction of its power we cannot give our assent. When the legislature conferred this power of appointment, it was necessarily implied that it was not a warrant for an arbitrary and unjust use of it, but that it should at all times be exercised for the best interest of the people and children of St. Louis considered as an entire body politic, and for the conservation of the great and sacred trust committed to their keeping for strictly educational purposes, and that it should never be prostituted to the building up of any sect, or party.

And where, as in this case, a majority of partisans refuse arbitrarily to permit those of different political views, though equal in numbers and in interest, and citizens without reference to party affiliations, to respectfully petition and demand that the elec-

tion officers shall not be all of one party, and this in a district where the two great parties are so equally divided that it is extremely doubtful which predominates, but one conclusion can be legitimately drawn from their conduct, and that is that they had predetermined to hold said election solely in the interest of their own political organization. Every presumption of correct and impartial official conduct in holding said election is negatived by the persistent, defiant, and repeated refusal of the majority to allow any one of the forty-two election officers appointed to be other than a ³⁰⁹ republican, though this action was in contravention of all precedent in any character of elections by the people of St. Louis.

There are neither fees, emoluments, nor perquisites lawfully connected with the performance of the duties of the members of the board of president and directors of the St. Louis public schools, and this circumstance would make it pleasant to note the alacrity displayed by certain citizens of St. Louis in so cheerfully and unselfishly devoting their time to the performance of the important and arduous duties of the board, without reward or remuneration, were it not for this exhibition of extreme partisanship, which inevitably forces upon us the unwelcome thought that other considerations than pure and unmixed virtue and patriotism have led to these sacrifices of time.

This school board was organized to control and manage the affairs of the schools of St. Louis. Taxes and revenues to the amount of one million dollars a year are levied and collected from various sources and pass through their hands to support these schools, and educate the children. Real properties of immense value are under its control. The citizen is taxed without reference to his politics or religion, and he has a clear and an inherent legal and constitutional right to see that his taxes shall go to the support of the school alone, and not to foster any political party, church, or sect whatever.

The constitution of Missouri prohibits the general assembly or any county, city, town, township, school district, or other municipal corporation, from ever making an appropriation, and from paying, from any public fund whatever, any thing in aid of any religious creed, church, or sectarian purpose, and from helping to support or sustain any private or public school, academy, seminary, college, university, or ³¹⁰ other institution of learning, controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal prop-

erty or real estate ever be made by the state or any county, city, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.

Within the spirit of this provision of our organic law, we hold that the prohibition of the constitution is as imperative against the support of a republican or a democrat school out of public funds or taxes exacted from all citizens of party affiliations as it is against the support of a Catholic, Baptist, Presbyterian, or Methodist school. Sectarianism includes adherence to a distinct political party as much as to a separate religious sect: Webster's International Dictionary, Century Dictionary, "Sectarianism."

And one need not be possessed of a great amount of prevision to foretell that if a school board, elected and pledged to be guided by the decision of a political caucus to shape the public school system in accordance with the partisan principles of the party nominating and electing it, can refuse all other citizens and adherents of all other parties from participation in the conduct and elections of its members, it will soon degenerate into a self-perpetuating body, and it will only be a short step to the adoption of the kindred policy of employing none but their own partisans for teachers and the exclusion of all literature and school books save those which inculcate their own partisan views and uphold their own political tenets, and thus entirely pervert the purpose of the state in adopting the system.

It is true, it is argued that while each one of the forty-two officers is a republican, he is qualified to act as a judge or clerk.

⁸¹¹ The stream cannot rise higher than its source, and we are dealing with facts and men as they exist, and we are not justified in treating this matter from an Arcadian or Utopian standpoint. If only honesty and fairness were the objects in view in the selection of these election officers by the board, it is incredible that the republican majority would have so ruthlessly denied every respectful petition to allow representation to the democrats in the appointments, and, when the refusal was buttressed with the announcement that it was a republican committee, and that not even a challenger on behalf of the democrats would be permitted at the polls, no court can shut its eyes to the purposes and perversions in view. School directors are sworn, not only to support the constitution, but to impartially administer their positions. One can hardly conceive of a stronger case of partisan partiality, or of absolute disregard of the rights of the public, in whose interests alone the board was created.

Without further discussion, our conclusion is, that in the action taken the school board so abused the discretion confided to it that it was a virtual refusal to perform the duty of holding an impartial election, and that in contemplation of law it has refused to act at all, and it is our duty to disregard its unjust action and require it by our mandate to proceed in a lawful way to hold said election.

The mere fact that it has essayed to act as it has presents no obstacle to the writ prayed in this case. Ample precedent will be found in the prior adjudications of this court: *State v. Philips*, 97 Mo. 331; *State v. Philips*, 96 Mo. 570. We regard this as settled law.

In *State v. Philips*, 97 Mo. 331, the writ of mandamus was invoked to require the Kansas city court of appeals to reinstate an appeal which that court had ³¹²dismissed, and it was allowed and sustained. In that case Sherwood, J., after a most exhaustive discussion of the authorities, sustained the superintending power of this court to direct the reinstatement of the appeal, notwithstanding the court had already acted and this court had no appellate jurisdiction from that court's decision.

The same principle is well illustrated by the case of *State v. Lewis*, 71 Mo. 170. In that case, the relator applied to the St. Louis court of appeals for an appeal to this court, and that court had allowed it. When he applied to that court for the approval of his bond, it refused to entertain it, because an appeal had been granted, but this court awarded a mandamus, and held it was a matter of no importance that the term had passed.

And in *State v. Philips*, 96 Mo. 570, it was held that, notwithstanding it was the duty of the court of appeals to certify the cause to this court during the term, it could not affect the power of this court to compel it to do so after the expiration of the term.

Those cases presented a much more serious legal difficulty than appears upon this record. Here, the duty of supervising the election of this director is still in the board, an unfinished and uncompleted duty, and the effort of relator is to prevent an abuse of the discretion confided to it by the law.

Inasmuch, therefore, as the said board and the said election committee have failed and refused to perform their duty in an impartial manner, and the duty is cast upon this court to correct the abuse of their franchise, and inasmuch as the election laws of the state furnish a safe and certain rule of impartiality for the

conduct of elections by the people, it is considered, ordered, and adjudged that the said school board and the said respondents proceed at once to revoke the said ³¹⁸ partisan appointments of judges and clerks by them made on or about the fourteenth day of April, 1896, and that said board proceed on Saturday, May 2, 1896, to appoint judges and clerks of said election, one-half of whom at each precinct shall be members of the republican party and one-half thereof democrats, all to be taxpayers of said tenth district of good reputation as honest, law-abiding citizens, and qualified in every respect to act as judges and clerks of said election, and certify their obedience to this order.

Sherwood and Burgess, JJ., concur.

MANDAMUS—DISCRETION.—Mandamus cannot issue to control the discretion of officers, unless some abuse thereof is shown: *State v. Rickards*, 16 Mont. 145; 50 Am. St. Rep. 476, and note.

MANDAMUS—AGAINST SCHOOL DIRECTORS.—Mandamus will issue against the officers of a school district requiring them to conform to the law or to reinstate a teacher whom they have removed without authority for so doing: *Gilman v. Bassett*, 88 Conn. 298.

STATE v. MURPHY.

[124 MISSOURI, 548.]

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—A municipal corporation vested with power to regulate the size of its streets, can permit the use of their surface for the erection of telegraph and telephone poles, and the laying of railroad tracks, the space above the surface for stringing electric wires for the transmission of messages and the creation of light, and may also permit the laying of water and gas pipes and sewers beneath the surface.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—Under general power to regulate the use of its streets, a city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface, or through conduits beneath the surface, provided such structures do not materially interfere with the ordinary uses of the streets and public travel thereon, but the city has no power to authorize such a use of the street as will destroy its usefulness as a public thoroughfare.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—Power vested in a city to regulate the use of its streets refers to legitimate public uses not inconsistent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners. An ordinance having the effect of diverting the streets from a public to a private use, or of unreasonably diverting and appropriating them to a public use other than that of ordinary travel, is *ultra vires* and void.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—The dedication of streets to public uses includes as

well the soil beneath them as the surface. The city has the same power to regulate the use of the streets beneath as upon the surface thereof, and such power is in like manner limited to public uses in existence and those which may spring into existence.

MUNICIPAL CORPORATIONS — STREETS — ELECTRIC WIRES UNDER GROUND.—A city vested with power to regulate the use of its streets has power to authorize, and, if public safety and general welfare demand it, to require, all electric wires used for the benefit of the public to be laid under ground.

MUNICIPAL CORPORATIONS — STREETS — POWER TO REGULATE USE OF—PRIVATE USE.—A city, vested with power to regulate the use of its streets, has no power to grant a private corporation the right to occupy them by conduits beneath the surface, for the purpose of conducting electricity, without requiring them to be used for the benefit of the public, and without reserving any control over the business or use of the corporation. Such a grant is for a private use, and ultra vires and void.

MUNICIPAL CORPORATIONS—ESTOPPEL.—The doctrine of estoppel cannot be applied as against a city, to validate a contract which it has no power to make.

MUNICIPAL CORPORATIONS—STREETS—USE OF.—A city vested with power to regulate the use of its streets has no power to divert their uses from those to which they were dedicated.

MUNICIPAL CORPORATIONS—STREETS—REGULATING USE OF.—Power vested in a city to regulate the use of its streets does not authorize it to grant their use to another for subways to conduct electricity, though his sole purpose may be to lease them to wire-using corporations, unless the city reserves the power to supervise and control, not only the work of excavating in the streets, but also of all matters incident to location, construction, maintenance, and use for such purpose.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—If a telegraph or other such corporation has express power from the state to place its wires and other fixtures under ground in the streets of a city, upon obtaining the consent of the latter, the city, by merely giving such consent, reserves no power of regulation, except such as is incident to the regulation of the use of the streets and such as the safety and welfare of the public may demand. Any further rights reserved to the city must be secured as conditions of the grant or consent.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—A city vested with power to regulate the use of its streets has no right to grant the exclusive use of the surface beneath its streets for the private gain of its grantee, though he intends to lease it to others for a public use. Such a grant is a delegation of powers and control which the city alone can exercise.

J. G. Chandler, R. L. McLaran, and E. A. Noonan, for the relator.

D. D. Fisher and E. C. Kehr, for the respondent.

DIVISION ONE.

⁵³⁴ **MACFARLANE, J.** On the fifteenth day of February, 1889, an ordinance of the city of St. Louis, number 14798, entitled, "An ordinance to provide for laying electric wires underground," was passed and approved.

By section 1 permission and authority was granted the National Subway Company, of Missouri, its successors and assigns, to construct, maintain, and operate conduits, pipes, mains, conductors, manholes, and service and supply pipes in any of the streets, ⁵⁵⁵ alleys, squares, avenues, and public highways of the city of St. Louis, for the term of thirty-five consecutive years. The objects are declared to be those of "distributing and maintaining a line or lines of electric and other wires, together with all necessary feeders, outlets, service wires, or other electrical conductors to be used for the transmission of electricity for any and all purposes."

It was further provided, that "before said company, its successors, or assigns, should lay any conduits or pipes in any of the streets it should submit to the board of public improvements its plans and the same should be approved. Section 2 prescribed the manner and depth in which conduits and pipes should be laid in the streets. Section 3 required the work to be done with the least possible injury or delay to the public, and that the streets be left in proper condition. Section 4 required the deposit of \$1,000, to secure the proper repair of streets and imposed a penalty for neglect to repair. Section 5: The corporation is declared to be a common carrier, and is required to permit any person or persons, company or companies, to use said system of underground conduits upon terms agreed upon by the respective parties, and, in case of a failure to agree, arbitration was provided for. Section 6 requires the corporation to furnish, in addition to other taxes assessed by law, and maintain at its own expense, all the wires of the fire and police alarm and telephone service of the city of St. Louis, free of charge to the city. Section 7 makes the corporation subject to ordinances of the city now in force, or that may hereafter be passed in relation to making excavations in streets. ⁵⁵⁶ Section 8 nullified the ordinance unless a bond for \$25,000 with approved security should be filed in ninety days, conditioned for the faithful observance of the ordinances. The ordinance was also made null, unless work was commenced in sixty days. Section 9 declares a forfeiture for violation of the conditions and provisions of the ordinance. Section 10 gives the city the right to purchase the property at the end of the term granted.

On February 6, 1891, ordinance number 15953 was passed, entitled, "An ordinance amendatory of ordinance number 14798 of the city of St. Louis entitled: 'An ordinance to provide for the

laying of electric wires underground.' ” This ordinance strikes out sections 6 and 10 of ordinance 14798 and substitutes for sections 1, 4, and 5, three other sections.

The only material change made by section 1 is to extend the duration of the franchises to fifty years and to grant the right to distribute and maintain “electric, telegraph, telephone, and other wires.” No material change was made to section 4.

Section 5 as amended, besides declaring said company, its successors and assigns, a common carrier, requires a payment to the city for the rights and franchises granted, semiannually in advance, the sum of \$500. No provision is left for the use of wires by the city, or the right of any other company or person to use them.

Said National Subway Company was incorporated January 28, 1889, under the act providing for the incorporation of telegraph and telephone companies, now article 5, chapter 42, Revised Statutes, 1889, with a capital stock of \$250,000 divided into 25,000 shares of \$10 each. The purposes of the incorporation as declared in the articles of association are to construct, own, operate, and maintain a line of ⁵⁵⁷ underground magnetic telegraph in the city of St. Louis.

On the 5th of February, 1889, the board of directors sold and assigned all the rights and franchises granted by said ordinance to Charles Sutter for the consideration of \$100.

On the 25th of February, 1889, the St. Louis Subway Company was incorporated under article 8, chapter 21, Revised Statutes of 1879, as a private business corporation with a capital stock of \$500,000 divided into 50,000 shares of \$10 each, which was alleged to have been actually paid up in lawful money of the United States. Of this stock the said Charles Sutter subscribed for 49,800 shares.

The purposes of this corporation as declared in the articles were: “To lay out and maintain, construct, and operate lines of subway in this state for the purpose of carrying wires for the transmission of electricity and electric currents, and in and about said business to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises; to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company.”

On February 28, 1889, this corporation was organized, and purchased from Charles Sutter the rights and franchises granted under said ordinances, for which it agreed to pay \$498,000. Mr.

Sutter accepted 49,800 shares of fully paid up stock in satisfaction of the purchase price. The other shareholders, except one who subscribed for 25 shares, paid for their stock by services rendered.

From June, 1889, to the end of that year, the St. Louis Subway Company obtained permits upon plans approved by the board of public improvements and ⁵⁵⁸ caused a line of subways to be constructed, about one and one-sixth miles in length, as follows: On Broadway, from Elm street to St. Charles; on Market street, from Broadway to Tenth; on Tenth street, from Market to Chestnut; and on Chestnut street, from Tenth to Fourteenth street.

The subways occupy a space in the streets about six feet deep and three feet wide, with manholes about five to six feet in diameter at each street crossing, and at other points where obstructions are to be passed.

From 1889 to 1894 nothing was done in the way of building conduits. On the tenth day of May, 1890, John B. O'Mera obtained judgment against the St. Louis Subway Company in the St. Louis circuit court for \$8,869.23, for work done on the subways above mentioned, and on the tenth day of June, 1890, Emile A. Meysenburg obtained a judgment against it in the same court for \$42,911.22, on account of work, material, and money applied to the construction of said subways. Upon these judgments executions were issued, and the sheriff seized all the right, title, and interest of the St. Louis Subway Company in and to the franchises acquired by it under the ordinance 14798, and all its title in and to the subways above mentioned, and all pipes, mains, iron, etc., belonging to said company, and on July 21, 1890, sold the same to Emile A. Meysenburg for the sum of \$1,000, to whom the sheriff executed a deed as for the sale of real estate.

Alias executions were issued on said judgments, and the same property seized and sold under them as personal property on January 7, 1891, at which sale Emile A. Meysenburg was again the purchaser at the sum of \$500, and for which he received a bill of sale from the sheriff.

The relator, the St. Louis Underground Service Company, was incorporated February 26, 1891, as a ⁵⁵⁹ private business corporation, under article 8, chapter 42 of the Revised Statutes of 1889, with a named capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, which is alleged to have been fully paid in lawful money. The stock was subscribed as follows: Emile A. Meysenburg, 9,000 shares; Robert McLaran, 250; Benjamin Von

Phul, 250; Andrew J. Cooper, 250, and Charles Sutter 250 shares.

The purposes for which this company was organized "are to lay out and maintain, construct, and operate lines of subway in this state for the purpose of carrying wires for the transmission of electricity and electric currents; also to lay out, construct, and maintain and operate lines of pipes, mains, and conductors in this state for the purpose of distributing substances, either for fuel or illuminating purposes, or for both, and for said purposes to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises, to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company.

Emile A. Meysenburg, on March 10, 1891, for the expressed consideration of \$900,000, by bill of sale transferred to the St. Louis Underground Service Company all the property and rights he acquired by purchase at the sheriff's sales above mentioned. By this transfer he paid his subscription for the 9,000 shares of stock subscribed by him. From this time, March 10, 1891, until the summer of 1894, the St. Louis Underground Service Company did nothing in the way of building conduits.

In May, 1894, relator made application for and received a permit to and laid a subway 180 feet in length on Olive street from Broadway ~~500~~ east to an alley at the middle of the block, and south on said alley to a point opposite the operating room of the Postal Telegraph Company, in the Laclede building. And on August 20th, it obtained a permit and constructed a subway about 165 feet in length on Fourteenth street, from Chestnut to the alley in the middle of the block, and about 16 feet into the alley.

In November, 1894, relator made application in due form to respondent, as street commissioner, for permit to construct conduits on Chestnut street. The plans had previously been submitted to and approved by the board of public improvement. Respondent refused to grant the permit. This proceeding is by mandamus to require respondent, as street commissioner, to grant the permit. A writ was issued and respondent has made return thereto, to which relator demurred. From the pleadings and the evidence taken the foregoing facts are deduced.

While the legal questions involved are raised by demurrer to the return, the entire case was presented by oral argument and brief of counsel. We will consider the merits of the case without regard to the form in which it has been presented.

1. A number of questions were discussed by counsel, both in argument and brief, but the most important, and, as we think, the controlling, one is whether the city of St. Louis had the power to grant to the National Subway Company the franchises now claimed by relator. If it had no such power and is not estopped by what it has done in affirmance of its grant, the controversy necessarily ends, and consideration of other questions will be unnecessary.

Municipal as well as other corporations derive their power from the legislature and can exercise none not confided to them. To the charter of the city of St. ⁵⁶¹ Louis, then, we must look for authority to make the contract in question: *State v. Clarke*, 54 Mo. 35; 14 Am. Rep. 471.

The charter undoubtedly vests in the city large power and control over the streets and other public property within its limits. It has power to establish, open, and vacate all streets, public grounds, and squares, and regulate the use thereof; to lease portions of the unimproved wharf; to license, tax, and regulate telegraph companies, and street railroad cars; to have sole power and authority to grant to persons or corporations the right to construct railways in the city, and, finally, to pass all such ordinances, not inconsistent with the provisions of the charter, or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures: *Charter*, Rev. Stats. 1889, pp. 2085, 2100.

The power to regulate the use of streets is very comprehensive. "The word 'regulate' is one of broad import. It is the word used in the federal constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be": Mr. Justice Brewer in *St. Louis v. Western Union Tel. Co.*, 149 U. S. 469.

Under the power thus delegated, it cannot now be questioned that the municipal authorities can permit the use of the surface of the streets for the erection of telegraph and telephone poles, and the laying of railroad tracks, the space above the surface for stringing electric wires for the transmission of messages and the creation of light, and may also permit the laying of water and gas pipes, and sewers, beneath the surface: *Julia Building Assn. v. Bell Tel. Co.*, 88 Mo. 258; 57 Am. Rep. 398; *St. Louis v. Bell*

Tel. Co., 96 Mo. 629; 9 Am. St. Rep. 370; Ferrenbach v. Turner, 86 Mo. 416; 56 Am. Rep. 437; Schopp v. St. Louis, 117 Mo. 136.

⁵⁶² These uses are all of a public nature, and are not inconsistent with the public uses to which the streets were dedicated. Under its general power to regulate the use of streets, the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface, or through conduits beneath the surface of the streets, provided, such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon.

But the city has no power, under this or any other provision of its charter, to authorize such a use of the streets, though for a public purpose, as will destroy its usefulness as a public thoroughfare: Lockwood v. Wabash R. R. Co., 122 Mo. 86; 43 Am. St. Rep. 547; Knapp v. St. Louis etc. Ry. Co., 126 Mo. 26, and cases cited.

So it is well settled that the city of St. Louis has no power to authorize the appropriation of any parts of its streets for private purposes. The power to regulate the use of streets refers to legitimate public uses not inconsistent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners. An ordinance having the effect of diverting the streets from a public to a private use, or of unreasonably appropriating them to a public use other than that of ordinary travel by pedestrians and vehicles is ultra vires and void: Knapp v. St. Louis etc. Ry. Co., 126 Mo. 26; Dubach v. Hannibal etc. R. R. Co., 89 Mo. 488; Belcher etc. Co. v. St. Louis etc. Elevator Co., 82 Mo. 124; Schopp v. St. Louis, 117 Mo. 136; Glaessner v. Anhauser-Busch Brewing Assn., 100 Mo. 508.

It is true that these decisions and the principle declared were applied to grants authorizing the use of the surface of the streets. But the public use of streets, as has been said, is not confined to the surface, nor is ⁵⁶³ the power of the city confined to that of regulating the use of streets and public grounds. To it is also delegated general police powers and under them it is authorized to pass "all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." In the exercise of the powers thus delegated, it has the undoubted right to regulate the public use of the streets both above and beneath the surface.

This it constantly does by allowing public sewers, water mains, and gaspipes to be laid beneath the surface, and regulating the manner in which the work shall be done.

It is said in a recent case: "This power to regulate the use of streets is not confined to the regulation of travel thereon, but under it the city may allow gas, water, and sewer pipes to be laid therein and may cause wells therein to be filled, . . . and may permit the erection and maintenance of telephone poles thereon. . . . All these uses are consistent with the uses for which streets are acquired or dedicated": *Schopp v. St. Louis*, 117 Mo. 136. The dedication of the streets, then, to public uses, includes as well the soil beneath them as the surface itself. The city authorities had the same power to regulate the use of the streets beneath as upon the surface thereof, and the power is in like manner limited to public uses.

It has also been held that the general power to regulate the use of streets is not confined to public uses common and known at the time of the dedication, but extends to new uses as they spring into existence: *St. Louis v. Bell Tel. Co.*, 96 Mo. 629; 9 Am. St. Rep. 370.

Under these well-settled principles, there can be no doubt that the municipal authorities of the city of St. Louis, vested as they are with such enlarged control over property devoted to public uses, has the power to ⁵⁶⁴ authorize, and if public safety and general welfare demands it, to require, all electric wires, used for the benefit of the public, to be laid under ground. This would be a proper and legitimate regulation of the public use of the streets. But the streets of a city are dedicated to public uses only, and are held by the municipality in trust for such uses. The trust is sacred, and the city has no authority, even under such enlarged powers as St. Louis possesses, to permanently divert any portion of it from these uses to such as are purely private.

The question then is, whether, under the ordinance granting to the National Subway Company of Missouri, its successors or assigns, the right to construct, maintain, and operate conduits, pipes, mains, conductors, manholes, and service and supply pipes, in any of the streets, alleys, etc., of the city of St. Louis, during the term of fifty years, was for a public or private use. If for the latter, it must be held *ultra vires* and void.

While under the pleadings the issues were made by demurrer to the return, evidence was taken by the parties and filed, and the

case was argued as well upon the evidence as upon the allegations of the pleadings, we consider the question as presented under the pleadings and the evidence. "If it is doubtful or questionable whether the use is public or not, testimony is admissible to determine the fact."

The purpose of the grant, as declared in the ordinance, is that of "distributing and maintaining a line or lines of electric, telegraph, telephone, and other wires . . . to be used for the transmission of electricity for any and all purposes." By section 5, as amended, it is declared that such corporation (its successors or assigns) shall be a common carrier, and shall have and enjoy such rights, privileges, and immunities as are usually had and enjoyed by such companies." ⁵⁶⁵ These are the only purposes expressed in the ordinance.

A clause of section 5 in the original ordinance, which was omitted from the amendment, provided that said corporation shall permit "any persons, company, or companies, to use said system of underground conduits," upon terms to be fixed as therein provided.

There is nothing in the terms of the ordinance from which an inference can be drawn that the proposed conduit and wires should be used for the benefit of the public. The corporation was not at the time engaged in the business of transmitting messages by use of electric wires, or of transmitting electricity for the purpose of producing light, and no inference can be drawn that the proposed transmission of electricity was for use of the public. After the amendment of section 5 of the original ordinance no obligation was left on said corporation to serve the public in any capacity.

The corporation to which the franchises were granted was chartered under the general laws of the state for the purpose of constructing, owning, operating, and maintaining a line of underground magnetic telegraph in the city of St. Louis, but, immediately on obtaining the franchises conferred by the ordinance, it sold and assigned them to relator, into whose hands they are claimed to have passed by assignment. Relator was not even organized as a telegraph company. It was organized as a business corporation. Its purposes, as declared in its articles of association, are "to lay out and maintain, construct, and operate lines of subway in this state for the purpose of carrying wires for the transmission of electricity and electric currents; also to lay out, construct, and maintain and operate lines of pipes, mains, and

conductors in this state for the purpose of distributing substances, either for fuel or illuminating purposes, or for both."

⁵⁶⁶ So it appears that relator does not, under its charter, undertake to discharge a public duty by itself using the wires for telegraph or telephone purposes. Its purpose, so far as appears from the ordinance or charter, is to occupy the streets by subways and electric wires. It is placed under no obligations to use them, or cause them to be used, for the benefit of the public. Still it claims the right to so occupy every street in the city for fifty years. No duty whatever is imposed upon it, no control over its works or business is retained by the city, except in the mere approval of the plans it may adopt for making the subways and the manner of executing the work.

The evidence shows that the object to be accomplished in granting these important franchises was to vest in one company the right to build suitable conduits and to require all telegraph, telephone, and electric light companies to lease and use the wires of the favored company, its successors or assigns.

We do not think it necessary to inquire whether a contract of this character, had the objects been expressed, could be upheld. Such purposes were not expressed; on the contrary, the provision in section 5 of the original ordinance which did give "any person or persons, company or companies," the right to use the system of underground conduits, was studiously omitted from the amended ordinance. As the ordinance now stands, relator is under no obligation to permit any telegraph, telephone, or electric light company to use its wires, and it is thus given the power to control the use of the streets for its own private benefit.

We think the extraordinary rights, powers, and franchises granted under the ordinances can only be construed to have been intended for the private use of ⁵⁶⁷ said corporation, and that the city, therefore, had no power to grant them.

Much stress is laid upon the fact that the National Subway Company is declared under the ordinance to be a common carrier. But calling it a common carrier does not make it one. It has none of the characteristics of a common carrier. To ascertain how its franchises are to be used, we must look to the rights conferred and the duties imposed under its charter and the ordinance. Does it appear from these that relator invites employment from the public generally? Does it obligate itself to serve the public generally? Is it subject to regulation and control in respect to its dealings with the public? None of these essentials

to a public business, such as that of a carrier, appear. On the contrary, it is clear, as has been shown, that a private business only is contemplated.

2. But it is insisted that inasmuch as relator and its assignors have gone to large expense, with the knowledge of the city, in constructing subways in some of the streets, and have paid to the city semiannually, in advance, the sum of five hundred dollars for the rights and franchises granted it, as required by section 5 of the amended ordinance, the city should now be estopped to deny the validity of the ordinance.

There is no doubt that the doctrine of estoppel is, as a general rule, alike applicable to corporations and individuals. It cannot, however, be applied to validate a contract which the corporation had no power to make. The doctrine is thus declared: "Where a municipal corporation enters into a contract, which it has the power to make, the doctrine of estoppel applies to it with the same force as to individuals": *Union Depot Co. v. St. Louis*, 76 Mo. 393.

The rule is thus given by Bigelow: "If the act undertaken was in and of itself ultra vires of the corporation, ⁵⁶⁸ no act of the body can have the effect to estop it to allege its want of power to do what was undertaken: Bigelow on Estoppel, 5th ed., 466, 467. See, also, *Scovill v. Thayer*, 105 U. S. 143; *Thomas v. Railroad Co.*, 101 U. S. 86; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 317.

In the case last cited it is said: "We know of no well-considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further can be compelled to do so."

As the city had no power to authorize the use of its streets for private purposes by ordinance, it certainly cannot do so by estoppel.

Peremptory writ denied.

Brace, C. J., and Robinson, J., concur.

Barclay, J., concurs in the result.

MACFARLANE, J. This is an original proceeding by mandamus, the purpose of which is to require respondent Murphy, as street commissioner of the city of St. Louis, to grant relator a permit to construct conduits beneath the surface of Chestnut street in pursuance of contracts claimed to have been made with the city under ordinances.

The case was heard on a demurrer to respondent's return, and the demurrer was overruled. Relator, under a leave of court, has answered the return. Evidence was taken, and the questions in issue have been argued, and the case is now to be determined upon its merits.

A full statement of the pleadings will be found to accompany the former opinion. Most of the evidence was also then on file, and was treated in the argument on the demurrer and in the opinion as forming a part of the record. ⁵⁶⁹ The answer of relator is, in substance, a denial of the allegation of the return.

The answer, by way of new matter, averred that its articles of association had been amended since the commencement of this proceeding, whereby its purposes are more distinctly set out as follows:

"This company is organized for the purposes of laying out, constructing, maintaining, and operating conduits or subways, pipes, mains, conductors, manholes, and service pipes in the streets, alleys, or other public places in the cities of this state and elsewhere, to be used in distributing and maintaining a line or lines of electrical and other wires owned by this company or others, together with all necessary feeders and service wires and other electrical conductors, and when used for the wires of others upon reasonable and just compensation; and to acquire and hold all necessary or useful grants, to occupy and use the streets, avenues, alleys, and other public places for the purposes aforesaid; to acquire and hold such property, real and personal, and incorporeal, as may be requisite and necessary in the premises; to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company; to make proper by-laws, and to do and perform all such matters and things as may be necessary and usual for the effectual consummation of the purposes for which the company is formed."

The answer, also, for the purpose of showing the intention of the parties in making the contracts, and granting the franchises, evidenced by the ordinances, stated at length the situation in the city of St. Louis in respect to the manner in which electricity was then carried, the inconvenience and danger of such methods, and the necessity of providing for placing electric wires underground.

⁵⁷⁰ It charges that electric wires, for all the uses to which they are applied, are for the benefit of the public, as well as for the private gain of the owners, and that its subways "are intended and designed for the use of all persons upon reasonable rates and

like conditions who may desire to use the same by placing wires therein or connecting with wires to be laid therein, and its property and employment are thereby affected with public use, and being so affected, whether its charter or the ordinances granting the right to construct and operate its works retains the reserved right to control and regulate the said conduits and the operation thereof or not. Such power, authority, and control exists to the extent of protecting the public against danger, unjust discrimination, extortionate charges, and injustice and oppression."

The new evidence introduced bore upon the character of the uses to which electric wires are applied for the purpose of showing that all such uses are public in their nature; the inconvenience and danger of overhead wires, and the necessity, convenience, and economy of placing them underground, and in one subway.

1. We are unable to perceive that the answer of relator, the amendment of its charter, and the supplementary evidence now before us, have so changed the situation as to require a different conclusion from that reached upon the former hearing.

On that hearing, it was held that the city, under its charter rights, has the power to control and regulate the public use of its streets and public grounds, not only upon, but, if public safety requires it, above and beneath, its surface, and, in the exercise of its general police powers, it may require all electric wires, whose use are of a public character, to be placed underground. But it was held further that the unconditional and uncontrolled grant contained in these ordinances was ⁵⁷¹ essentially for the private use of the grantee and its assigns, to which the city had no power to devote its streets.

No claim was made on the first hearing, nor indeed can it be justly made now, that relator proposes to deal directly with the public. At most, it only proposes for its own private gain to furnish others the instrumentalities by means of which they may subserve the public interest. Over the use, sale, assignment, or lease of these instrumentalities the city has expressly reserved no control or management. The business thus proposed can no more be denominated public than could that of manufacturing electric wires for the use of a telegraph company, or rails for use in the track of a railroad, or pipes for conducting water or gas through the streets. A single instrument, though a necessary part of a public work, is not a public instrumentality for the manufacture of which the power of eminent domain could be ex-

exercised even by the state. The use to which it may be applied is not the test of its public character. The use to which the entire work, and not parts of it, are to be applied, is the proper test.

The city of St. Louis made an unconditional lease of a portion of its public wharf to an elevator company to be used for erecting and maintaining a warehouse for the storing and handling of grain and other merchandise in connection with the use of its elevator. The power of the city to make the lease was questioned. This court held that while the city had power to lease its unused wharf for the purposes specified in the lease, it had no right to authorize the erection of such buildings thereon without reserving a control over the buildings and the uses to which they should be applied; *Belcher etc. Co. v. St. Louis etc. Elevator Co.*, 82 Mo. 126.

The court in its opinion says: "The owner of the building may open or close it at his pleasure, and discriminate ⁵⁷² between shippers and receivers of produce, and make his as strictly a private business as if a retail dry goods merchant were permitted to erect a building on the wharf to conduct his business in. There is no reservation by the city in the lease to defendant of any control whatever of the building or business." The court says further: "The city has no right, and can acquire none from the legislature, to make such a disposition of the property condemned for wharf purposes, as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect."

The same may be said in respect to the property held in trust by the city for public streets. The city has no power to divert their uses from those to which they were dedicated. It had no right to grant their use to relator for subways, though its sole purpose may be that of leasing them to public wire-using corporations, without reserving the power of supervision and control, not only of the work of excavating in the streets, but of all matters incident to its location, construction, maintenance, and use. No such powers have been reserved under these ordinances.

2. It is now insisted that inasmuch as all the uses to which electric wires are ordinarily applied are of a public character, and as the subways are to be used by corporations exercising public functions, they are for public, and not for private, use, and the power of regulation and control is reserved in the municipal authorities. In other words, that the uses to which the subways are to be applied, and not the ownership, determines their char-

acter, and, if the use is public, the streets may be devoted to their maintenance, and the power to regulate is reserved.

It may be conceded that the use of electric wires for the transmission of messages by telegraph and telephone, ⁵⁷³ and for the distribution of light throughout the city for the use of its inhabitants, is essentially public in its character, and to which the public streets may be properly devoted. Indeed, the correctness of this proposition has been frequently declared by this court, and is recognized by the legislation of this state: *State v. Murphy*, 130 Mo. 10, and cases cited; Rev. Stats. 1889, secs. 2721, 2792.

It may also be conceded that where the franchises granted by the government are for the purpose of subserving the public interests, power is reserved in the public to control the use for the common good unless restricted in the grant. As has been said, "The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law": *Perrine v. Chesapeake etc. Canal Co.*, 9 How. 192.

But it must be kept in mind that the city of St. Louis does not exercise original governmental functions, but only such measure thereof as the state has seen fit to delegate to it. Telegraph, telephone, and electric light companies also receive their powers directly from the state. The reserved power to regulate them, unless within the delegated power of the city, rests in the state. These corporations are vested with power, under certain restrictions, to use the public streets of cities and to place their wires and other fixtures underground on obtaining the consent of the municipal authorities thereof: Rev. Stats. 1889, secs. 2721, 2793.

It is evident that the city has no such reserved power over these wire-using corporations as is possessed by the state. It can only exercise such powers as are granted in express terms; those necessarily or fairly implied in or incident to those expressly given; those essential to the declared objects of the corporation: ⁵⁷⁴ 1 *Dillon on Municipal Corporations*, sec. 89; *St. Louis v. Bell Tel. Co.*, 96 Mo. 625; 9 *Am. St. Rep.* 370.

The express powers bearing upon the rights here claimed are confined to general police powers and the power to regulate legitimate public uses of the streets. But the public corporations to which the relator proposes to lease the use of the streets and through which it proposes to serve the public has express power from the state to place its wires and other fixtures under ground in the streets of cities, provided it obtain the consent of the municipal authorities thereof.

It is clear, therefore, that when a telegraph or other such corporation secures the right to lay its wires underground in the streets of the city, no power of regulation is reserved by the city, except such as are incident to the regulation of the use of the streets and such as the safety and welfare of the public may demand. Any further rights must be secured by contract as conditions of the grant.

3. But conceding that the subways relator proposes to construct are, without other requirements or conditions than those expressed in the ordinances, of such a public character and for such a public use as will authorize their construction in the public streets, and that the city has the power to confine their use to public purposes, we are still of the opinion that the ordinances are void for the reason that the city thereby undertakes to delegate powers which it alone can exercise under its charter.

The attempt is made under the ordinance to grant to the National Subway Company, and its assigns, the right to occupy space for its subway beneath the surface of every street in the city for the period of fifty years to the practical exclusion of all other public uses. It is given power to select its own patrons, and dictate its own terms. It can elect upon which streets ⁵⁷⁵ its works can be constructed. It can practically control the charges of all electric wire-using corporations. It has the practical control of the use of all public wires which may hereafter be required to go underground. By the ordinances the city virtually surrenders to relator its power to regulate the underground use of its streets by wire-using companies and permits their use for such public purposes only as may appear most profitable to relator. The contract can only be characterized as an attempt on the part of the city to surrender and bargain away to relator its charter powers. This it could not do. "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot . . . be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties": 1 Dillon on Municipal Corporations, sec. 97; *Belcher etc. Co. v. St. Louis etc. Elevator Co.*, 82 Mo. 126; *Matthews v. Alexandria*, 68 Mo. 119; 30 Am. Rep. 776; 15 Am. & Eng. Ency. of Law, 1045, and cases cited; *Goszler v.*

Georgetown, 6 Wheat. 593; Gale v. Kalamazoo, 23 Mich. 344; 9 Am. Rep. 80; Waterbury v. Laredo, 68 Tex. 565.

In the case cited, from 68 Missouri, the city of Alexandria undertook to lease to Matthews its wharf which the city had power to regulate and control. In passing upon the validity of the contract, the court says: "No authority was given by the charter to the city to lease the wharf, or farm out its revenues, or to empower anyone else to fix the rates of wharfage. All these things were attempted to be done by the contract under consideration, and, being wholly unauthorized, ⁵⁷⁶ the contract was illegal and void. The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public."

The evidence here shows and common knowledge advises us that economy of space, convenience to the public, security, and proper adjustment of conflicting interests of the various competing companies make it desirable, if not necessary, that all electric wires should be laid in one subway, but the city cannot cede to another the power of supervision over them. That power can only be exercised by the city.

Writ denied.

Brace, C. J., and Barclay, J., concur.

Robinson, J., dissents.

IN BANK.

Per CURIAM. The foregoing opinion of Macfarlane, J., handed down in Division Number One is adopted as the opinion of the Court in Bank. Brace, C. J., and Barclay, Gantt, Sherwood, and Burgess, JJ., concurring therein with Macfarlane, J.; Robinson, J., dissenting. The writ of mandamus is, therefore, denied.

MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—A municipal corporation may permit the use of its streets for the erection of telegraph and telephone poles, and the laying of railroad tracks, the space above the surface for stringing electric wires, and may also permit the laying of water and gas mains and sewers beneath the surface: Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 49 Am. St. Rep. 183; Louisville etc. Co. v. Central Ry. Co., 95 Ky. 50; 44 Am. St. Rep. 203; Chesapeake etc. Teleph. Co. v. Mackenzle, 74 Md. 36; 28 Am. St. Rep. 219, and extended note 229; Theobald v. Louisville, etc. Ry. Co., 66 Miss. 279; 14 Am. St. Rep. 564, and note; Daly v. Georgia etc. R. R. Co., 80 Ga. 793; 12 Am. St. Rep. 286, and note; Cincinnati etc. Ry. Co. v. Telegraph Assn., 48 Ohio St. 390; 29 Am. St. Rep. 559; Livingston v. Wolf, 136

Pa. St. 519; 20 Am. St. Rep. 936; *Barrows v. Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400.

MUNICIPAL CORPORATIONS—STREETS—DIVERSION TO OTHER THAN PUBLIC USE.—Since the primary and dominant purpose of a street is for public passage, any appropriation of it by legislative sanction to other objects must be deemed in subordination to this use, unless a contrary intent is clearly expressed: *Hudson River Tel. Co. v. Waterville etc. Ry. Co.*, 135 N. Y. 393; 31 Am. St. Rep. 838. A city, acting under special as well as general authority in granting a permit for, and regulating the construction of, vaults under its streets and alleys not inconsistent with their use by the public, and requiring compensation therefor, acts in its private corporate capacity, and, when such permit is accepted and acted upon by the holder, by making costly improvements required, it creates a contract between the parties irrevocable at the mere will of the city: *Gregsten v. Chicago*, 145 Ill. 451; 36 Am. St. Rep. 496; *Field v. Barling*, 149 Ill. 556; 41 Am. St. Rep. 811, and note.

MUNICIPAL CORPORATIONS—STREETS—POLICE POWER. The right of a railroad company to lay its track through the streets of a city is subject to reasonable regulation under the police power of the proper authorities: *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note; note to *Callanan v. Gilman*, 1 Am. St. Rep. 842. Municipal corporations have authority to make all reasonable regulations for the location and use of electric wires in the streets, and to require all reasonable safeguards to secure the safety and convenience of the public in the lawful use of the street and the transaction of business: *State v. Janesville etc. Ry. Co.*, 87 Wis. 72; 41 Am. St. Rep. 23.

MUNICIPAL CORPORATIONS—DELEGATION OF POWER OF.—Powers conferred upon a municipal corporation must be exercised by the municipality; and, so far as they are legislative, cannot be delegated to others, *Chicago v. Stratton*, 162 Ill. 494; 53 Am. St. Rep. 325, and note. The powers of corporate authorities over public streets of a city are held in trust for the benefit of the public, and cannot be delegated nor abridged by any act of such authorities: *Milhan v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 814; *Birdsall v. Clark*, 73 N. Y. 78; 29 Am. Rep. 108-110, and note.

MUNICIPAL CORPORATION—VOID CONTRACTS OF—CANNOT BE GIVEN VITALITY.—Contracts of municipal corporation, void for want of capacity in either party to make it, cannot be given life and vitality by the legislature against the wishes of either party to it: *Hasbrouck v. Milwaukee*, 18 Wis. 87; 80 Am. Dec. 718.

STATE v. BRANCH.

[124 MISSOURI, 592.]

GUARDIAN AND WARD—MISAPPROPRIATION OF FUNDS—LIABILITY OF SURETIES.—The use by a guardian in his private business of the funds of his ward is a misapplication thereof, creating a breach of his bond for which his sureties are liable; and if, when the ward becomes of age, such guardian is appointed trustee of the funds held as guardian and gives a receipt therefor, the fact of his solvency at that time does not relieve his sureties as guardian from liability, unless the ward's money was then actually on hand, or the amount was actually thereafter withdrawn from his business, and taken in charge in his capacity as trustee.

GUARDIAN AND WARD—MISAPPLICATION OF FUNDS—LIABILITY OF SURETIES.—If, upon a ward attaining majority, his guardian is appointed trustee of the ward's funds then in his hands, the neglect on the part of the guardian to take into his hands, as trustee, the trust funds creates a liability on the part of his sureties on his bond as trustee for losses thereby incurred, but does not relieve his sureties as guardian from liability for misapplication of funds while he was guardian.

JUDGMENTS—CONCLUSIVENESS OF—ESTOPPEL.—The conclusiveness of a judgment, as between the parties to it is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided.

JUDGMENTS—RES JUDICATA—PARTIES CONCLUDED. Only parties to a former judgment and those in privity with them are concluded thereby, but they may be bound thereby in a subsequent proceeding to which they are parties and which involves the identical issue, though the adversary parties are not the same.

JUDGMENTS—RES JUDICATA—PARTIES BOUND.—A party sought to be bound by a former judgment must have been a party to both actions, and he must have been a party to both in the same capacity or character.

JUDGMENTS—RES JUDICATA—GUARDIAN—TRUSTEE. A judgment on an application for the removal of a trustee that he has received funds as trustee from himself as guardian, is not res judicata in an action on his bond as guardian for misappropriation of such trust funds.

ESTOPPEL BY JUDGMENT MUST BE MUTUAL, and a ward or cestui que trust is not bound by a judgment unless the guardian or trustee is also bound.

GUARDIAN AND WARD — MISAPPROPRIATION OF TRUST FUNDS—ESTOPPEL AGAINST WARD—LIABILITY OF SURETIES.—If, when a ward attains majority, his guardian, on his final accounting as such, and on the petition of the ward, is appointed trustee of the fund held as guardian, and receipts for it as trustee, and such proceedings are ratified by the ward, who afterward, as cestui que trust, receipts for money received from such trustee as trustee, the cestui que trust is estopped, as against the sureties on the guardian's bond, from claiming that he did not transfer the trust fund to himself as trustee, especially if, at the time of his final settlement as guardian, he was possessed of property out of which, by proper diligence, he could have transferred the trust funds to himself as trustee.

R. S. MacDonald and E. C. Kehr, for the appellant.

B. Schnurmacher, J. S. Laurie, and V. Reyburn, for the respondents.

⁵⁹⁶ **MACFARLANE, J.** Alice Crookes, while yet a minor, received a legacy under her father's will. Defendant, Joseph W. Branch, was duly appointed her guardian, gave bond as such, and received the legacy, in April, 1875. The said Alice attained her majority February 25, 1882. Branch made final settlement of his curatorship in the probate court on July 19, 1884, in which there was found to be due his ward the sum of nineteen thousand eight hundred and thirty-two dollars and ⁵⁹⁷ fifteen

cents, which was ordered paid to the trustee of the said ward when appointed. In January, 1885, the said Alice Crookes filed her petition in the circuit court, reciting the foregoing facts, and stating that Branch then held in his hands, ready to be paid over, the said sum, and praying an order appointing the said Branch her trustee to receive and hold said sum for her use.

The court found the facts as stated, and ordered that "Joseph W. Branch be, and he is hereby, appointed trustee, with all the powers and authority in and by said will vested in her, the said Alice Crookes; and the said Joseph Branch here, in open court, accepts said trust, and files his bond in the sum of forty thousand dollars, with Charles P. Chouteau and R. M. Parks as securities, and conditioned for the faithful discharge of the trust, which bond the court now approves." On June 16, 1885, Branch presented to the probate court a copy of the order, and submitted his receipt as follows:

"St. Louis, Mo., June 1, 1885.

"Received this day of Joseph W. Branch, curator of the estate of Alice Crookes, the sum of nineteen thousand, eight hundred and thirty-two and 15-100 dollars, in full payment of the balance found due from him at the final settlement of her estate in the probate court of St. Louis City, July 18, 1884. Evidence of my appointment as trustee by the circuit court of St. Louis City is herewith submitted

JOSEPH W. BRANCH,
Trustee."

Thereupon the court made this order:

"Now comes Alice Crookes, late a minor, by Joseph W. Branch, her trustee, and acknowledges in open court full and entire payment and satisfaction of the balance ordered to be paid and delivered to her upon the final settlement of said Joseph W. Branch, curator of her estate heretofore made herein. It is thereupon ⁵⁹⁸ ordered by the court that said Joseph W. Branch be, and he is hereby, finally discharged as such curator, Receipt filed."

This suit is against Branch and his securities upon his curator's bond, and charges a conversion of the funds prior to his appointment as trustee. This is the third appeal. The opinion of the court in the two former appeals will be found reported, respectively, in 112 Mo. 661, and 126 Mo. 448, to which reference is made for a more specific statement of the facts.

The original answer stated all the foregoing facts and it was claimed that thereunder the judgments and orders of the probate

court were conclusive on Miss Crookes that the funds had been transferred from Branch as guardian to Branch in his capacity of trustee. After the second appeal, defendant filed an amended answer, in which he stated all the foregoing facts and the following additional new matter: On the 7th of March, 1888, the said plaintiff, Alice Crookes, commenced her suit in the circuit court of the city of St. Louis against Branch, in which she charged that, as trustee, he had received the trust funds, and had afterward misapplied and converted them to his own use, and neglected and refused to apply them in her support and maintenance, as required by the terms of the will. She prayed that Branch be removed from the trusteeship; that a successor be appointed; that an account be taken; and that he be required to pay over to his successor the amount found to be due. To said suit Branch entered his appearance, and, upon a hearing, the court found that Branch, "as such trustee, received into his possession the sum of nineteen thousand eight hundred and thirty-two dollars and fifteen cents of the estate belonging to the plaintiff, and that said defendant has . . . misapplied said trust funds, and appropriated the same to his own use." On a hearing of that case, the court found a balance due ~~500~~ Alice Crookes from Branch, as trustee, of twenty thousand six hundred and eighty-nine dollars and sixty-nine cents, and ordered that the same be paid over to his successor. Richard Hospes was thereupon appointed trustee, and gave bond as such.

Afterward, in August, 1888, the said Hospes, as trustee, commenced a suit against Branch and his securities on his bond as trustee, charging a misappropriation of the funds while acting in that capacity, which suit is still pending. This suit was commenced in March, 1889. An agreement was afterward entered into between the plaintiffs herein and the sureties of the bond of Branch as trustee, to the effect that plaintiffs would prosecute this suit to final judgment, and, if unsuccessful in it, the said securities agreed to pay the amount found due as trustee. Under this agreement, a sum was paid to plaintiffs, which was to be credited as a payment, if they should afterward be adjudged liable; if not, then it should be refunded.

Upon the trial, the foregoing facts were shown by the records of the court, and other evidence. Plaintiffs offered evidence in rebuttal, tending to prove that the information upon which the former proceedings were prosecuted was obtained from Branch

himself, by which they were misled and deceived into making the declarations and admissions therein contained. It was further shown on the trial that, prior to his settlement as curator, Branch had used the funds of his ward in his private business, and that they were being so used at the time the settlement was made, and, as a matter of fact, the money was not in his hands, and never was transferred, but was continued in his private business as before. The evidence also tended to prove that at the time Branch, as trustee, filed in the probate court the receipt from himself as curator, he was possessed of sufficient property, subject to execution, out ⁶⁰⁰ of which the balance due his ward could have been collected by process of law.

At the request of the plaintiffs, the court gave the jury this instruction: "The court instructs the jury that the burden rests upon defendant to show that Branch, as curator of Alice, paid over to himself, as her trustee, the sum ascertained upon his final settlement to be due from him as curator. And the court further instructs the jury that, in order to show such payment, it must appear from the evidence, to the satisfaction of the jury, that Branch, as curator, at the time of his qualification as trustee, had said sum of money actually in hand. It is not sufficient to show that Branch at such time had property of his own upon the credit of which he could have raised the money had he so desired.

The jury are instructed that if Branch, as curator, and prior to his qualification as trustee, had appropriated to his own use the funds received by him as curator to said Alice, and at the time of his appointment as trustee did not have in hand the money belonging to said Alice Crookes, then, even though at the date of his qualification as trustee said Branch may have had property of his own subject to execution, of sufficient value to have enabled the claim in behalf of said Alice against him to have been collected by due process of law, yet such fact is immaterial, and does not relieve his bond as curator from liability in this action.

Defendants, the sureties on the curator's bond, asked, and the court refused to give, these instructions:

"1. If the jury believe from the evidence that the defendant Joseph W. Branch was appointed trustee of Alice Crookes, as recited in the answer of the defendant Tittman, and that, after such appointment, he executed the receipt dated the first day of June, 1885, and read in evidence by defendants, he thereby ⁰⁰¹ elected to hold from that time forward the fund recited in said

receipt as trustee, and not as curator of Alice Crookes; and, it at that time he actually had her estate in his hands, then such election transferred the fund from himself as curator to himself as trustee, and the jury will find the issues herein for the defendant Eugene C. Tittman, administrator of the estate of Basil W. Alexander."

"4. If the jury believe from the evidence that Joseph W. Branch was appointed trustee of Alice Crookes, as recited in the answer of defendant Tittman, it became and was his duty upon such appointment to collect, in his capacity as trustee, from himself as curator, the balance which, upon final settlement of the curatorship of said Alice Crookes, he was ordered by the probate court to pay to said Alice Crookes' trustee; and if the jury believe from the evidence that, at the time said Branch was so appointed trustee, he was possessed of property sufficient, subject to execution, out of which such balance could have been collected by process of law if some person other than himself had been appointed such trustee, then the sureties on the trustee's bond read in evidence are liable for said balance, and the sureties on his curator's bond are exonerated, and the jury will find for the defendant Tittman."

Instructions was also asked by said defendants, and refused by the court, to the effect that plaintiff Alice Crookes was, by her proceedings in the cases prosecuted by her, her declarations and admissions therein, and the findings and judgments of the court, estopped to deny that Branch held the funds as trustee, and that said defendants were released as sureties on his bond as curator. The judgment was for plaintiffs, and defendants appealed.

602 1. In the latter of the two previous appeals in this case, which was heard by the court in Bank, it was distinctly held that the use by Branch, as curator, of the funds of his ward in his own private business was a misapplication, which created a breach of his bond, for which his sureties were liable, unless the money was actually in hand when he was appointed trustee, or the amount was thereafter withdrawn from his business, and taken in charge in his capacity of trustee. The fact that he was at the time solvent, and that he was possessed of property subject to execution out of which the balance due his ward could have been collected by process of law, did not relieve his sureties on his bond as curator. We feel ourselves bound on this appeal by this ruling. This judgment must, therefore, be taken as settling

the law on this branch of this case, and justified the circuit court in giving to plaintiffs the instruction complained of, and in refusing the first instruction asked by defendants.

In *Tittman v. Green*, 108 Mo. 22 (which is identical with this one in its facts), the suit was against Branch and his securities as trustee; and Division 2 of this court held that if Branch had assets in his hands as curator, or was possessed of property, out of which the funds could have been collected by process of law, elected by some unequivocal act, to hold the funds as trustee, he would thereby shift the liability from his bondsmen as curator upon his bondsmen as trustee. It is evident that this ruling is inconsistent with the judgment of the court in *Bank* on the second appeal in this case, in holding that a mere election on the part of Branch would relieve the securities on his bond as curator from liability for a misappropriation of the funds committed while acting in the capacity as curator. When Branch was appointed trustee, he assumed the duty of withdrawing the trust funds from his private ^{cos} business, and of holding and administering it as trustee, and for the performance of his duty his securities bound themselves as well and as fully as for its proper management after it came into his hands.

But it does not follow that a neglect on the part of Branch to take into his hands, as trustee, the trust funds, would relieve the securities from a liability that existed when the settlement as curator was made. If a third person had been appointed trustee, it would have been his duty to have collected the amount due from the curator or his securities. While a neglect to do so would create a liability on the part of the securities on his bond as trustee for the losses thereby incurred, it would not alone relieve his securities as guardian from their liability for the original default. These principles are necessarily drawn from the former decisions in this case. The second instruction asked by defendants, and refused by the court, was, therefore, erroneous in declaring, under the facts stated, that the sureties on the curator's bond were exonerated from liability. We find no error, therefore, in the proceedings upon any of the questions heretofore considered.

2. It is now insisted that the proceedings prosecuted by plaintiffs in the circuit court, and the finding and judgment thereon, estop them to deny that Branch took the trust funds into his hands as trustee. This question was not involved in the former appeals. In the proceedings instituted by Miss Crookes to have

Branch appointed her trustee, and in the subsequent proceedings to have him removed, she states unequivocally that she has the funds in hand, and the court so finds, and enters judgment accordingly. It is first insisted that the fact thus became *res adjudicata*, and is conclusive upon plaintiffs. The law at this day is well settled that the conclusiveness of a judgment, as between the parties to it, is not confined to the entire ⁶⁰⁴ matter litigated, but includes the finding of any facts which were in issue and were necessarily decided: *Cromwell v. County of Sac*, 94 U. S. 351; *Freeman on Judgments*, sec. 249.

In a suit for an installment of interest on a promissory note, the defendant pleaded an alteration of the note which avoided it. This issue was found against him. In a subsequent suit on the note itself, the question as to the alteration was held to be *res adjudicata*: *Edgell v. Sigerson*, 26 Mo. 583. In *Young v. Byrd*, 124 Mo. 590, 46 Am. St. Rep. 461, it was held that, where the effect of a judgment is to decide a particular issue of fact, that issue must be held *res adjudicata* as to the parties then before the court; and it is immaterial in what form the issue was raised, if it was decided between the adversary parties on its merits.

Nor is it regarded as being essential to the conclusiveness of a former recovery that the parties are identically the same as those to a suit in which an attempt is made to litigate the same issue. Only parties to the former judgment and those in privity with them are concluded, but they may be bound thereby in a subsequent proceeding to which they are parties, and which involves the identical issue, though the adversary parties are not the same: *Young v. Byrd*, 124 Mo. 590; 46 Am. St. Rep. 461; *Nave v. Adams*, 107 Mo. 420; 28 Am. St. Rep. 421. But the former proceeding was against Branch as trustee, and he is now sued in his capacity of curator. The party concluded by a former judgment must not only have been a party to both actions, but he must have been before the court in the same capacity in each. "It is not only necessary that the person sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character. . . . This rule is one of the fundamentals of the jurisprudence of the subject": ⁶⁰⁵ *Black on Judgments*, sec. 536; *Bigelow on Estoppel*, 130; *Freeman on Judgments*, sec. 156; *Herman on Estoppel*, sec. 94; *Collins v. Hydorn*, 135 N. Y. 320.

A finding and judgment, therefore, that Branch held the

funds as trustee, will no more conclusively protect him as curator from a charge of misapplying the trust funds while acting in the latter capacity than a finding in his favor in the former suit would be conclusive against him in this one. If the judgment was not conclusive upon Branch, it did not conclude plaintiffs, though their interests be identical. Estoppels must be mutual. Miss Crookes cannot be bound unless Branch would have been bound had the judgment gone the other way: *Henry v. Woods*, 77 Mo. 281; *Collins v. Hydorn*, 135 N. Y. 320; *Freeman on Judgments*, sec. 159. Plaintiffs are not, therefore, concluded by the former judgments.

3. But it is insisted that plaintiff Alice, by her conduct and declarations, is now, in equity, estopped, as against the sureties on the guardian's bond, to deny that Branch received the funds as trustee. It stands established by the records and judgments of the circuit court in the former proceedings that the said plaintiff, in the most solemn manner, declared that Branch had taken the funds into his hands as trustee. The records of the probate court show that she was duly notified that Branch, as curator, would make his final settlement. The records of said court also show that the funds were transferred to Branch, as trustee. Branch was appointed trustee upon the petition of said plaintiff, in which it was solemnly stated that he held the funds in his hands ready to be transferred. The order was made appointing Branch trustee, and he was ordered to transfer the funds to himself as trustee. A receipt was duly filed in the probate court showing that the transfer had been made, and Branch, as curator, ⁶⁰⁶ was, so far as the probate court could act, discharged as curator. Every act was done by plaintiff that it was possible for her to do in ratification of the acts of her curator, and in affirmance of the records of the probate court. The matter was allowed to stand in that condition for about two years, said plaintiff continuing to reaffirm the truth of the records by receipting for money from Branch in his capacity of trustee.

Under all principles of equity and good conscience, plaintiff should not be allowed to deny the truth of what the record shows, if, by doing so, others will suffer loss or injury. The sureties on Branch's bond as guardian obligated themselves to answer for any default of their principal. They had the right to protect or secure themselves against liability in case the misconduct of their principal became manifest. Upon the settlement of the curator in the probate court, they became *prima facie* respon-

sible for the amount found due, if it was not properly accounted for, and paid over according to the orders of the court. They had the right to see that the orders of the court were obeyed, and, if not, to take steps to relieve themselves of their obligations, or to secure themselves against loss. The orders of the probate court were only evidence of their discharge. How could they determine the absolute truth except by inquiry of the trustee and the cestui que trust? An examination of the records will show that both these, unequivocally and in the most solemn manner, affirm their truth. The securities had a right to rely in absolute confidence on the record and the judicial declarations of plaintiff affirming its truth: *Greenleaf on Evidence*, sec. 527 a; *Cosgrove v. Tebo etc. R. R. Co.*, 54 Mo. 499.

It will not do to say that Miss Crookes was misled and deceived by Branch as to the facts, and that the declarations were made in ignorance of the true facts. ⁶⁰⁷ She was of age, and was represented by counsel. If she were ignorant of the facts, it was on account of her own inexcusable negligence, which she cannot allege: *Herman on Estoppel*, 882, and cases cited.

If, therefore, Branch, when he made his settlement as curator, was possessed of property out of which, by proper diligence, he could have transferred the trust funds to himself as trustee, then plaintiffs, by their conduct, admissions, and declarations, are estopped to deny that he did his duty. The judgment is reversed, and the cause remanded.

Brace, C. J., absent.

Barclay, J., did not sit.

The other judges concur.

GUARDIAN AND WARD—MISAPPROPRIATION OF FUNDS—
LIABILITY OF SURETIES.—Surety of guardian undertakes that his principal will faithfully perform his duty in respect to the money that comes into his hands belonging to the ward: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and note. Suits against guardians and sureties: See note to *Commonwealth v. Stub*, 51 Am. Dec. 534. The investment of the ward's money by the guardian in his own business, or in the business of others in which he has an interest, as a mere business investment, is a conversion of such money, for which he becomes immediately liable on his bond: *State v. Sanders*, 62 Ind. 562; 30 Am. Rep. 203.

RES JUDICATA—PARTIES.—The final determination of an issue of fact by a competent court, and upon the merits, is *res judicata* as to the parties then before the court, though it is afterward sought to relitigate the same issue in another forum. Nor is it essential that all the parties to both proceedings be identical: *Young v. Byrd*, 124 Mo. 590; 46 Am. St. Rep. 461, and note. Conclusiveness as respects parties: See note to *Wright v. Griffey*, 87 Am. St. Rep. 234.

ESTOPPEL, BY JUDGMENT—An estoppel must be mutual. It must bind both parties: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247, and note. Estoppel by judgment must be mutual: See note to *Hill v. Bain*, 2 Am. St. Rep. 877.

MORAN v. PULLMAN PALACE CAR COMPANY.

[184 MISSOURI, 641.]

MUNICIPAL CORPORATIONS.—ORDINANCES REQUIRING DEPRESSIONS AND EXCAVATIONS within a city which are below the natural or artificial grade of surrounding or adjacent streets to be filled or fenced, and prescribing a penalty for failure to comply with the requirements of the ordinances, apply only to cases where the owner's property extends up to the highway, and the excavation or depression is in such close proximity to such highway as to endanger the safety of travelers thereon.

MUNICIPAL CORPORATIONS.—ORDINANCES.—A municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes.

MUNICIPAL CORPORATIONS — ORDINANCES—LIABILITY OF CITY.—A city is not liable in damages for injury to persons resulting from a failure to enforce ordinances requiring excavations and depressions in city lots adjacent to the highway or street to be filled or fenced by property owners.

MUNICIPAL CORPORATIONS—ORDINANCES—FILLING DEPRESSIONS.—A city ordinance requiring parties making, or causing to be made, any excavation in or adjoining any public street, alley, highway, or public place, to so fence it as to prevent injury to persons, animals, or vehicles, does not apply to one who purchases property with an excavation already upon it.

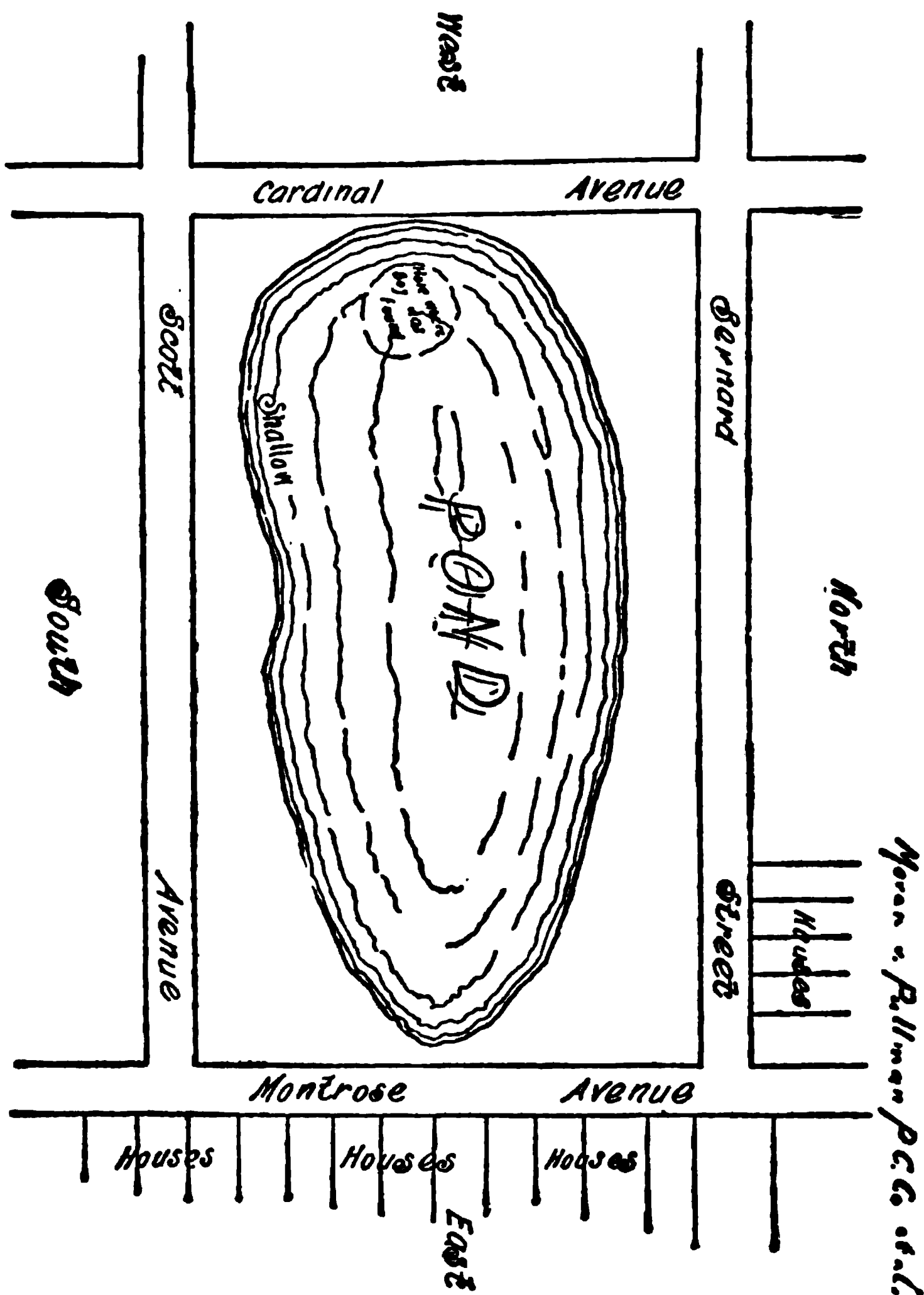
NEGLIGENCE—DUTY OF OWNER TO FENCE CITY LOT—INJURY TO TRESPASSER.—An owner of an unfenced city lot is not liable in damages for the death of a person, old or young, who goes upon the premises without invitation or permission, and is drowned while bathing in a pond on the lot.

NEGLIGENCE—DANGEROUS PREMISES—TRESPASSERS. The owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is not required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon such premises, not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity.

J. P. Leahy and L. F. Ottofy, for the appellants.

Dickson & Smith and W. C. Marshall, for the respondents.

645 SHERWOOD, J. The subjoined plat shows the locality and surroundings of the accident which constitutes 646 the basis of the present action for damages caused by the drowning of plaintiffs' son in a pond:



Bernard street on the north, Montrose avenue on the east, Scott avenue on the south, and Cardinal avenue on the west are the boundary lines of a square of ground ⁶⁴⁷ owned by the Pullman Car Company. Within that square of ground is located a pond caused by excavations in quarrying rock there. There are no houses in the immediate neighborhood except as indicated on the plat, in the northwest corner of Bernard street and Montrose

avenue, and on that avenue. With the exception of Montrose avenue, none of the streets in the vicinity have any existence, save on paper, there being nothing to indicate where they are, and westward from Montrose avenue, for more than half a mile, the country is an open prairie, crossed at will by foot passengers, travelers on horseback or in vehicles.

Along the entire front of the property thus bounded, that is to say, on the west line of the sidewalk on the west side of Montrose avenue, extended a perpendicular bank of earth, something like six feet high, so perpendicular as to require two footboards at the base to keep the earth from falling on the sidewalk.

The pond shown by the diagram begins some twenty feet west of the west line of Montrose avenue, still farther away from the south edge of the block of ground in question, that is, on Scott avenue, a less distance from the north side of the block on Bernard street, and some twenty-five feet east of the east line of Cardinal avenue.

The pond is quite shallow, not exceeding, it seems, some three feet deep in most places, and sloping gradually toward the Cardinal avenue side. On that side it begins quite shallow at first, grows deeper until it is about three feet deep some ten or fifteen feet from the shore, when there is a sudden depression making the water some fifteen feet deep. This sudden depression, however, where the water is of that depth, is, it seems, quite circumscribed in area as indicated by the plat.

For a number of years, boys in the vicinity and neighborhood of the pond had been accustomed at all ⁶⁴⁸ hours during the day to bathing in it. Policemen would occasionally drive them away. Of evenings men also would come to the pond for the purpose of bathing.

In the afternoon of June 15, 1892, between 2 and 3 o'clock, plaintiffs' son, a boy some nine years of age, went in swimming or bathing in the pond and was drowned, his nude body being shortly afterward found in the depression already mentioned, about forty feet from the east line of Cardinal avenue. The boy's parents lived about a mile from the pond and allowed him full liberty to play with other boys on the streets.

The gravamen of plaintiffs' action in substance is, that the pond was attractive to children who were accustomed to bathe therein; that it was a dangerous place by reason of the deep hole therein; that defendants knew or might have known of the danger of the place to children, and that they were in the habit

of bathing in the pond; that defendants negligently permitted the pond to be frequented by children, to remain unguarded and unfenced; neglected to fill said excavation and to fence the same as required by divers ordinances which were pleaded, and such failure resulted in the death of plaintiffs' son, who, entering the pond where it seemed to be shallow, fell over into the deep portion and was drowned.

The answer of the city was a general denial, coupled with a plea of contributory negligence. The answer of the defendant company was in effect a general denial, coupled with pleas averring that plaintiffs' son was, at the time of his injury and death, trespassing on defendant's property, and, while so trespassing without leave or license, was guilty of such contributory negligence in wading or swimming about in the pond as directly led to his death. To these answers plaintiffs replied.

649 The ordinances pleaded are as follows:

"All holes, depressions, excavations, or other dangerous places within the city of St. Louis that are below the natural or artificial grades of the surrounding or adjacent streets, shall be filled up so as to prevent persons and animals from falling into them": Art. 4, c. 15, sec. 619.

"The street commissioner shall notify the owners or occupants of premises on which such dangerous places exist to cause fences or walls to be built around them, or to cause the same to be filled up, within such period as he shall deem the exigencies of the case may require. In case of failure to comply by any of the owners or occupants of said premises, after the notification above required has been given, then they shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined before the police court not less than ten nor exceeding five hundred dollars": Art. 4, c. 15, sec. 620.

"Whenever the said owner or occupant cannot be found, then the street commissioner shall cause such dangerous places to be fenced in": Art. 4, c. 15, sec. 621.

"The expense which the street commissioner may incur in doing the work above mentioned shall be charged to, and paid out of, appropriations for street and alleys": Art. 4, c. 15, sec. 622.

"Every person who shall cause to be made any excavation in or adjoining any public street, alley, highway, or public place shall cause the same to be fenced in with a substantial fence not less than three feet high, and so placed as to prevent persons, ani-

mals, or vehicles from falling into said excavations, and every person making or causing to be made any such excavation, and every person who shall occupy or cause to be occupied any portion of any public ⁶⁵⁰ street, alley, highway, or public place, with building materials or any obstruction, shall cause one red light to be securely and conspicuously posted on or near such excavation, building material, or obstruction; provided such obstruction does not extend more than ten feet in length, and if over ten feet and less than fifty feet, two red lights, one at each end, shall be so placed, and one additional light for each additional fifty feet or part thereof, and shall keep such lights burning during the entire night": Art. 1, c. 15, sec. 571.

With the exception of the last-mentioned section, the ordinances were rejected as to both defendants when offered in evidence.

At the close of the evidence, the court, of its own motion, gave instructions in the nature of demurrers to the evidence, and plaintiffs took a nonsuit, etc.

1. The ordinances which were rejected were properly rejected, and this for several reasons. In the first place, such ordinances only apply to cases where the owner's property extends up to the highway and the excavation or depression is in such close proximity to that highway as to endanger the safety of travelers as travelers on such thoroughfare; and not otherwise: *Eisenberg v. Railroad*, 33 Mo. App. 85; *Overholt v. Vieths*, 93 Mo. 422; 3 Am. St. Rep. 557; *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Barney v. Hannibal etc. R. R. Co.*, 126 Mo. 372; 2 *Dillon on Municipal Corporations*, 4th ed., sec. 1005.

In the second place, a municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the state. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes: *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Philadelphia etc. R. R. Co. v. Ervin*, 89 Pa. St. 71; 33 Am. Rep. 726; *Vandyke v. Cincinnati*, 1 Disn. 532; *Kirby v. Boylston etc. Assn.*, ⁶⁵¹ 14 Gray, 249; 74 Am. Dec. 682; *Flynn v. Canton Co. etc.* 40 Md. 312; 17 Am. Rep. 603; *Fath v. Tower etc. R. R. Co.*, 105 Mo. 537.

In the third place, a city is not liable for damages resulting from a failure to enforce such police regulations as are the ordi-

nances in question; 15 Am. & Eng. Ency. of Law, 1154, and note 3, and cases cited.

2. The last quoted ordinance is also objectionable for like reasons as before stated, and also for the additional reason, so far as concerns defendant company, that there is no evidence tending to show that it caused to be made the excavation. And the ordinance does not apply in any event to one who has bought property with an excavation already upon it.

3. The views expressed in *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, are applicable to the case at bar, and are not rendered inapplicable by the fact that in the former case the child entered onto the premises where he was drowned, through adjoining private property. The same principle applies whether the unauthorized entry be made on private grounds, with private grounds as a medium of reaching the locality where the injury occurs, as applies where a public street is used for a like purpose. *Overholt's* case has been recently and approvingly cited and followed in the quite recent cases of *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, and *Barney v. Hammibal etc. R. R. Co.*, 126 Mo. 372.

Having fully discussed, in those cases, the subject here involved, it is needless to go over the same ground again. Abundant authorities, in addition to those just mentioned, have been collected by the industry of counsel, which fully maintained the same views as those already announced.

The case of *Richards v. Connell*, 45 Neb. 467, was decided last year by the supreme court of Nebraska. The facts in that case are almost identical ⁶⁵² with those of this case. The action there, as here, was against the city (of Omaha) and the owners of certain uninclosed lots of ground. The petition there alleged that defendants had, for a long time prior to the death by drowning of a boy about ten years old, permitted the surface water to accumulate on the lots, thereby creating a deep and dangerous pond, and that defendants had failed and neglected to fence the lots or erect any barrier to prevent children lawfully in the vicinity from falling in the pond; that the lots were in the vicinity of a public school, and adjacent to a street, and in a public place much frequented, and were attractive to children of tender years, who were accustomed to play about and upon the water. The boy was playing upon a raft floating on the water, and fell in and was drowned. A demurrer to the petition was sustained by the lower court.

The court say: "The petition, we think, fails to state a cause of action against the defendants, and that the demurrers were rightly sustained. The single question presented by the record is, whether the owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity." This case also approvingly cites and follows: *Overholt v. Vietha*, 93 Mo. 422, 3 Am. St. Rep. 557, and distinguishes the case then in hand from what are commonly known as the "turntable cases." To the like effect see: *Ratte v. Dawson*, 50 Minn. 450; *Charlebois v. Goebic etc. R. R. Co.*, 91 Mich. 59; *Murphy v. Brooklyn*, 118 N. Y. 575; *Stergen v. Van Sicklen*, 132 N. Y. 499; 28 Am. St. Rep. 594; *Greene v. Linton*, 7 Misc. Rep. 272; 27 N. Y. Supp. 892; *Clark v. Manchester*, 62 N. H. 577; *Frost v. Eastern R. R. Co.*, 64 N. H. 220; 10 Am. St. Rep. 396; *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339; *Benson v. Baltimore* ⁶⁵² etc. Co., 77 Md. 535; 39 Am. St. Rep. 436; *Mergenthaler v. Kirby*, 79 Md. 182; 47 Am. St. Rep. 371; *McGuinness v. Butler*, 159 Mass. 283; 38 Am. St. Rep. 412; *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281, and other cases.

For these reasons we affirm the judgment.

All concur.

MUNICIPAL CORPORATION—EXCAVATIONS BORDERING HIGHWAY.—A municipal corporation is liable for permitting an excavation to remain unfenced, or without proper guards, in such close proximity to the highway that one rightfully using it may, without any fault on his part, but as the result of an unintentional deviation or an accidental misstep, sustain injury by falling into such excavation. But it is not liable where, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another: *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281, and note. Owner of land is not under obligation to strangers to put guards around excavations made by him, unless such excavations are so near a public highway as to be dangerous, under ordinary circumstances, to persons passing along the way, and using ordinary care to keep upon the proper path; in which case he must take reasonable precautions to prevent injuries happening to such persons: *Overholt v. Vieths*, 93 Mo. 422; 3 Am. St. Rep. 557, and note.

MUNICIPAL CORPORATIONS—BREACH OF ORDINANCE—LIABILITY INCURRED BY.—One who neglects to perform a specific duty imposed upon him by statute or municipal ordinance, for the protection or benefit of others, is liable to those, for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect: *Osborne v. McMasters*,

40 Minn. 103; 12 Am. St. Rep. 698, and note. A municipal ordinance required owners of wharves to maintain cap-logs. Owing to the absence of a cap-log on defendant's wharf, the plaintiff, acquainted with the premises, sustained injury. Held, that no liability was raised by mere noncompliance with the ordinance: Philadelphia etc. Ry. Co. v. Ervin, 89 Pa. St. 71; 83 Am. Rep. 726. The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator: Heney v. Sprague, 11 R. I. 456; 23 Am. Rep. 502. An action for damages will not lie against the owner of property abutting a sidewalk in a city for an injury caused by snow and ice thereon, although he is required by a city ordinance to remove snow and ice from the sidewalk, which he neglected to do: Flynn v. Canton Co., 40 Md. 312; 17 Am. Rep. 603, and note; Kirby v. Boylston Market Assn., 14 Gray, 249; 74 Am. Dec. 682.

NEGLIGENCE—INJURY TO INFANT TRESPASSER—LIABILITY OF OWNER OF PREMISES.—Defendant owned an abandoned and uninclosed brickyard, with an open and unguarded, but plainly visible, well in it, about eighty feet from the nearest highway. The public were accustomed to cross the yard, but the paths were somewhat distant from the well. The nearest dwelling-house was three hundred yards distant. The lot was a common place of resort for children and adults. A boy eight years old was found drowned in the well, evidently having been fishing in it by daylight. Held, that no action would lie: Gillespie v. McGowen, 100 Pa. St. 144; 45 Am. Rep. 365. The owner of a city lot, on which he is constructing a building, is not liable for injury to a trespassing child, caused by the falling of a building stone while playing on the lot without the knowledge of the owner, or any express or implied invitation or inducement to enter upon the premises: Witte v. Stifel, 126 Mo. 295; 47 Am. St. Rep. 668, and note. See notes to Kansas Central Ry. Co. v. Fitzsimmons, 31 Am. Rep. 206; McAlpin v. Powell, 26 Am. Rep. 562; Donaldson v. Wilson, 1 Am. St. Rep. 489. Municipal corporation is not liable for leaving place alluring to children exposed without barriers, when such place can only be reached by leaving the highway and trespassing upon the premises of another. Its duty does not extend to the protection of children against every sudden freak that may possess them: Clark v. Richmond, 83 Va. 355; 5 Am. St. Rep. 281.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

STATE v. CAMP SING.

[18 MONTANA, 128.]

CONSTITUTIONAL LAW.—ALL REASONABLE DOUBTS must be solved in favor of legislative action. Every statute must, therefore, be sustained, unless its conflict with the constitution is beyond reasonable doubt.

CONSTITUTIONAL LAW—LICENSES.—The legislature of every state has full power to enact a license law, unless forbidden by the state constitution.

CONSTITUTIONAL LAW.—THE OPINIONS OF THE FRAMERS OF A CONSTITUTION expressed during its preparation, as in debates in the constitutional convention, may be examined as tending to show their intentions.

CONSTITUTIONAL LAW—CONSTRUCTION.—If the intention of any given clause of a state constitution is not clear, it will not be so construed as to annul a statute enacted by the state legislature.

CONSTITUTIONAL LAW—LICENSE TAXES.—Under a constitution providing that the legislature may levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation of property for taxation, and may also impose a license tax both upon persons and upon corporations doing business in the state, and that it shall not levy taxes upon the inhabitants or property in any county, city, or town for county, town, or municipal purposes, but may by law vest the corporate authorities thereof with power to assess and collect taxes for such purposes, the legislature may authorize the collection of a license from persons doing business, though the object is the obtaining of revenue, a portion of which is to be retained by the counties.

CONSTITUTIONAL LAW — LEGISLATIVE CONSTRUCTION.—If the legislature of a state has, ever since the adoption of its constitution, recognized the principle that the subject of license taxes is for the legislature, this construction is entitled to consideration when a statute is claimed to be in conflict with the constitution, because it imposes a license fee or tax.

Action to recover a license fee claimed to be due from the defendant for conducting a laundry business. There was no doubt

of the existence of a section of the Political Code of the state imposing the license tax, but this imposition was claimed to be unconstitutional. The sections of the constitution relied upon were numbers 1 and 4 of article 12, which are as follows:

"Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

"Sec. 4. The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, or town, or municipal corporation for county, town, or municipal purposes, but it may by law vest in the corporate authorities thereof power to assess and collect taxes for such purposes."

The section of the code imposing the license tax provided that seventy per cent thereof should be retained by the respective counties in which the collections were made, and the residue paid over to the state. The trial court was of opinion that the reservation of this seventy per cent to the respective counties rendered the statute invalid, because it was an attempt to levy a tax upon the inhabitants or property within each county for county purposes. Judgment was therefore entered for the defendant, and the plaintiff appealed.

Henri J. Haskell, attorney general, Ella Knowles Haskell, and Carpenter & Carpenter, for the appellant.

Thomas E. Harvey, for the respondent.

130 DE WITT, J. Does section 4 of article 12 of the constitution ¹³⁷ prohibit the legislature from passing a law such as section 4079 of the Political Code of 1895, imposing a license tax upon persons and corporations doing business in the state, when part of the proceeds of such license tax goes to the county; and can such license tax be imposed only by the county, which is part recipient of the funds collected in pursuance of such statute? This important question could have been reached in the case of *State v. French*, 17 Mont. 54. It was within our contemplation at the time of writing that opinion, but the question was not mentioned or argued by counsel, and was therefore reserved. It has since engaged the attention of several of the

district courts, and of many of the most distinguished members of the bar in the state. The result is, that it has been thoroughly briefed and argued at this time by eminent counsel on both sides.

We are sensible of current affairs about us, and cannot but be aware that declaring section 4079 of the Political Code to be unconstitutional is the losing, for a considerable period of time, of an immense revenue; but we are obliged to close our minds to such considerations. As Mr. Justice Hunt said in *State v. Mitchell*, 17 Mont. 67: "It were far better at this time, in the early history of this new state, that a legislative act be declared invalid than that precedent be set by which plain provisions of the constitution be nullified by loose and questionable interpretations of our fundamental law; *State v. Tooker*, 15 Mont. 8.

And in the matter before us it is better that we suffer all the inconveniences of a present loss of revenue than that we let go of the constitution for the sake of relief from temporary distress. The argument *ab inconvenienti* must be excluded from all control over the decision.

But, on the other hand, we must keep in mind another rule of constitutional construction. Judge Cooley, in his *Constitutional Limitations*, said, in speaking of Chief Justice Shaw: "It has been said by an eminent jurist that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give ¹²⁸ it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject; and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained": Cooley's *Constitutional Limitations*, 182.

Judge Cooley also quotes the following from Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 128: "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be con-

sidered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

He quotes further from Mr. Justice Washington, as follows: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt": See, also, Endlich on Interpretation of Statutes, sec. 178.

Therefore, with these principles before us, and deeply sensible of the importance to the state of this decision, we approach its consideration with the sentiment that we must be at least fairly satisfied of the unconstitutionality of the license law before we so declare it.

¹³⁹ The legislature has full power to enact a license law, unless it is forbidden by the constitution. In the case of *State v. French*, 17 Mont. 54, after stating the common learning as to the difference between the constitution of a state and that of the United States, we said: "A state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of this sovereign constitution. We therefore inquire whether our constitution restrains the legislature from enacting such a law as sections 4079 and 4080 of the Political Code." We make the same inquiry now.

Article 12 of the constitution treats the subject of revenue and taxation. As observed by both counsel in this case, this article provides two systems of raising money. Without intending to be now wholly technical in the use of words, we may describe them as: 1. The taxation system; 2. The license system. We use these terms now simply for convenience, and not as an expression of an opinion in advance as to whether this license is a tax or not. If the legislature sees fit, all revenues may be raised by taxation. Taxation is the security for the debts and expenses. The license system is a further provision. As exigencies arise, or do not arise, or cease to exist, the license system may be, or need not be, resorted to. That system is elastic and pliable, and can be suited to circumstances.

The important question in this case is, What restraint, if any,

is placed upon the legislature in creating a license system? Before examining this question, we will notice that which appears in contrast; that is to say, the restrictions which are placed upon the power of the legislature as to taxation. They are very many. They are an inheritance of our history. We will review some of them. The rate of assessment and taxation shall be uniform, under such regulations as secure a just valuation for taxation of all property, etc: Const., art. 12, sec. 1. Liberal exemptions are provided for: Const., art. 12, sec. 2. Mines and mining claims in the state are liberally protected from what might be, perhaps, deemed excessive taxation: Const., art. 12, sec. 3. ¹⁴⁰ The valuation of the property for taxation for any town and school purposes shall not be greater than the valuation for state and county purposes: Const., art 12, sec. 5. The taking of private property for corporate debts of public corporations is guarded against: Const., art. 12, sec. 8. Provision is made for maximum rate of taxation for state purposes: Const., art. 12, sec. 9. All state taxes shall be paid into the state treasury, and shall not be drawn out but in pursuance of specific appropriations made by law: Const., art. 12, sec. 10. Taxes shall be levied and collected by general laws and for public purposes only, and shall be uniform upon the same class of subjects, within the limits of the authority levying the tax: Const., art. 12, sec. 11. It does not seem necessary to go further in citing the limitations put upon the power of taxation. The whole of article 12 treats this subject of limitation with great care. In almost every section can be found prohibitions or limitations upon the legislative power as to taxation.

But the license system of raising revenue and license taxes are mentioned by name in only one place in the constitution. That is the last sentence of section 1, which says: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state." With that utterance the constitution leaves the subject; that is, as far as any direct language is to be found. The license tax is not even controlled by the equality and uniformity requirements of the constitution: *State v. French*, 17 Mont. 54.

But, while the question of license taxes is not mentioned, in terms, elsewhere in the constitution, the defendant has presented a very able argument to the effect that the last sentence of section 1, article 12, and also section 4, while not so providing in direct language, must be read and interpreted to the effect that

the legislature is indeed prohibited from imposing a license tax, the proceeds of which, or part of the proceeds, are to go to the county. His first argument is found in the use of the word "also" in the last sentence of section 1. He contends that the word carries over into the sentence where it occurs the idea expressed in the sentence which precedes it. That is to say, that when the section says that the legislative ^{and} assembly may also impose a license tax, etc., it means that it may also impose such license tax for the support and maintenance of the state; and therefore that it cannot be imposed by the legislature partly for the support and maintenance of a county. But we do not think that the word "also" necessarily or reasonably has such meaning. It appears to us to be nothing more than a conjunctive, perhaps connecting the two sentences. It has about the same significance as "furthermore." Webster's International Dictionary gives the following definitions of the word "also": "In addition; besides; as well; further; too. 'Lay up for yourselves treasures in heaven; . . . for where your treasure is, there will your heart be also.' Matthew vi, 20, 21." The Century Dictionary gives these definitions: "In like manner; likewise; in addition; too; further. 'In fact, Mr. Emerson himself, besides being a poet and a philosopher, was also a plain Concord citizen.' Holmes on Emerson. 'This ye knowen also well as I.' Chaucer's Canterbury Tales." The simple reading of the whole section, to our minds, is that "the necessary revenue for the support and maintenance of the state shall be provided," etc., "and, in addition to this, and furthermore, the legislature may impose a license tax," etc. The use of the word "also" is to simply connect the ideas of the two systems of revenue mentioned in the section. It introduces the creation of the second system, to wit, the license system. In this sentence the license system first appears, and the sense of the whole section is simply that "there shall be the taxation system, and, furthermore, or also, the license system." Any common illustration of the use of the word "also," as employed in daily life, demonstrates that it does not carry over into the sentence where it is used all of the ideas expressed in the preceding sentence. One may say: "This morning I shall go to the statehouse for the purpose of arguing a case before the supreme court. I shall also stop at the county courthouse." The word "also" by no means conveys the idea that the speaker intends to stop at the latter place for the same purpose which called him to the former.

¹⁴² We are of opinion there is no real merit in defendant's contention as to the use of this word "also."

Therefore, having passed this branch of the contention, there are no such limitations upon the power of the legislature as are contended for by the defendant, unless they are found in section 4 of article 12. We will examine that section in a moment. We pause at this point to suggest another matter, and that is, to examine the opinions of the framers of the constitution, which they recorded during the preparation of this article 12. Such opinions may be examined as tending to show the intention. This was done in *Pollock v. Farmers' etc. Trust Co.*, 157 U. S. 429, popularly known as the "Income Tax Case," in which Mr. Chief Justice Fuller said: "We inquire, therefore, what, at the time the constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?" The learned chief justice then went into an extensive examination of the history of the country, and the debates in the constitutional convention of the United States.

We have consulted the proceedings and debates of the constitutional convention of this state at page 1325 et seq., as filed in the office of the secretary of state. There was an earnest debate over section 1, article 12, and many opinions were forcibly expressed that the state should not adopt a license system at all. It was also proposed to amend the last sentence of section 1, article 12, to read as follows: "The legislative assembly may also impose a license tax for the regulation of the sale of intoxicating liquors and other occupations requiring police supervision, both upon persons and upon corporations doing business in the state, and no license shall be imposed for any other purpose." The proposed amendment was defeated. The last member who spoke upon the question was the Honorable T. E. Collins, chairman of the committee on finance, and who was also chairman of the same committee in the old constitutional convention of 1884. He said that it would be safe to leave this matter to the legislative assembly. ¹⁴³ The sentiment of the convention was to this effect. So, instead of putting restrictions upon the power of the legislature as to licenses, as was done as to taxes, the constitutional convention deliberately, and after earnest debate and consideration, declined to do so.

Therefore, with all the evidence, both intrinsic and extrinsic, that the constitution intended to and did carefully limit the

legislative power as to taxation, and the total lack of evidence that it was the intention to so limit legislation upon the subject of licenses, may the language of section 4 be construed as a prohibition upon the legislature to impose a license tax for county purposes?

In the first place, if section 4 is such a prohibition, then there seems to us to exist a repugnancy between that section and the last sentence of section 1. The latter says broadly that the legislature may impose a license tax upon persons and corporations, etc. There is no qualification upon this power found in section 1. The power, as we have above construed section 1, is not in that section confined to imposing the license tax for state purposes only. This unlimited power being given directly by section 1, and deliberately, as the debates show, then, if we are to find it afterward limited by section 4, the words of section 4 to such effect should be clear: Cooley on Constitutional Limitations, above cited. We do not think it is clear, and we will point out the reasons for such opinion.

Of course, if the words "levy taxes," used in section 4, mean "license taxes," then the prohibition contended for by the defendant exists; and if those words do not mean "license taxes," the prohibition does not exist. In either event, it is, in our opinion, immaterial whether the license tax is for regulation or for revenue, and the distinction in license fees, as to whether they are for regulation or for revenue, is not important in the case. Even if the license tax be for revenue (which it probably is), and if it should, therefore, be construed to be a tax as that term is used in the cases distinguishing between a tax and a license fee for regulation, it is, in any event, a license tax provided for by the constitution, whether ¹⁴⁴ imposed for either purpose. It is therefore constitutional for either purpose, unless, of course, license taxes were within the contemplation of the framers when they used the words "levy taxes" and "assess and collect taxes" in section 4. The use of several words in article 12 is, to our mind, important. The article, in speaking of ordinary taxation and taxes, uses the words "levy," "assess," and "rate." In the only place in the article where license tax is mentioned, the word is "impose." The former words were apt in speaking of taxes, and the latter, in our opinion, is appropriate in describing licenses. As to the words "assess," "rate," and "levy," we note the following definition from standard dictionaries:

"Assess: Taxes in respect of land and houses are calculated

with reference to the estimated value of property, which is arrived at by a process called 'assessment'": Rapalje and Lawrence's Law Dictionary.

"Assess: 2. To adjust or fix the proportion of a tax which each person liable to it has to pay; to apportion a tax among several; to distribute a taxation in a proportion founded on the proportion of burden and benefit. 3. To place a valuation upon property for the purpose of apportioning a tax": Black's Law Dictionary.

"Assess: To set, fix, or charge a certain sum upon, by way of tax; as to assess each individual in due proportion": Century Dictionary.

"Assess: 1. To rate or fix the proportion which each person is to pay of a tax; to tax; to adjust the shares of a contribution by several persons toward a common object, according to the benefit received; to fix the value or the amount of a thing; to determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund; to fix the amount payable by a person or persons in satisfaction of an established demand": Anderson's Law Dictionary.

"Rate: It sometimes occurs in a connection which gives it a meaning synonymous with 'assessment'; that is, the apportionment of a tax among the whole number of persons who are responsible for it, by estimating the value of the taxable property¹⁴⁵ of each, and making a proportional distribution of the whole amount. Thus we speak of 'rating' persons and property": Black's Law Dictionary.

"Rate: A sum assessed as a tax; in England, a local tax; as the county, the borough, the poor rate. May apply to the percentage of taxation, or to the valuation of the property": Anderson's Law Dictionary.

"Ratable: 'Ratable estate,' within the meaning of a tax law, is a taxable estate": Anderson's Law Dictionary.

"Levy: To raise, execute, exact, collect, gather, take up, seize. Thus, to levy (raise or collect) a tax; to levy (raise or set up) a nuisance; to levy (acknowledge) a fine, to levy (inaugurate) war; to levy and execute—i. e. to levy or collect a sum of money on an execution": Black's Law Dictionary.

"Levy: (Law) 1. To seize or take (property) by virtue of a judicial writ thereunto commanding; 2. To impose or assess (a tax) on property, and collect it under authority of law": Standard Dictionary.

These definitions all carry the popular understanding of the words. They are appropriately used when speaking of taxation, and, we believe with the scholarship, learning, and ability which were present in the constitutional convention, they were deliberately used. They involve the ascertaining of values and fixing taxes in proportion thereto, and are used all through article 12 in regard to taxes and taxation: See sections of the article. But none of these words are used in the last sentence of section 1, article 12, where the license tax is provided for. There the word is "impose." That word is derived from the Latin word "imponere," meaning literally "to lay upon." Therefore we find throughout the whole of article 12 distinctive words used in speaking of the taxation system and the license system. Then we come to section 4, which defendant claims refers to licenses. There the words are "levy" and "assess"—the same words always applied in the article to the subject of taxation strictly. "Impose," the word adopted in treating of license taxes, is not used. It is deliberately omitted from section 4. Before the 14th constitution was finally adopted, a committee was appointed, and acted upon the subject of "revision and phraseology." Therefore, with all the debate in the convention, and with a final technical and literary revision of the constitution, we are of opinion that the use of the words "assess," "levy," and "rate" as to the one subject, and "impose" as to the others, is significant. Such words seem to express an intent that section 4 should refer to taxation strictly and not to licenses. In any event, it is by no means clear to us that the intent of section 4 was to refer to licenses; and, if the intent is not clear, we cannot put such construction upon it as will nullify the law under consideration: Cooley on Constitutional Limitations, above quoted.

Great importance is attached by the defendant to the case of *People v. Martin*, 60 Cal. 153, and that case is claimed by him to be applicable to the question now before us. The section of the constitution of California which it is urged is practically the same as our section 4, article 12, is section 12, article 11. It reads as follows:

"Section 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The case of *People v. Martin*, 60 Cal. 153, was an action to recover a license tax by reason of the defendant carrying on the business of selling goods. It was brought under section 3360 of the Political Code of California, which was a portion of the license law enacted by the legislature of California before the adoption of the present constitution of that state. The California court held that said license law was unconstitutional, by reason of section 12, article 11, of the constitution. Mr. Justice Ross, in delivering the opinion, said: "The important question in this case is, whether or not the word 'taxes,' as used in this section of the constitution, includes license taxes; for, if it does, the provisions of the Political Code imposing and ¹⁴⁷ providing for the collection of the license tax here in question are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of section 1 of article 22 of the same instrument. That the license fees imposed by the provisions of the Political Code were imposed mainly, if not solely, for the purposes of revenue, does not admit of doubt; and, where that is the case, they are, in effect, taxes: Cooley on Taxation, 396, 397; 2 Dillon on Municipal Corporations, sec. 768. Indeed, the statute itself designates the charge as a license tax: Pol. Code, sec. 3359.

"But are they 'taxes' within the meaning of section 12 of article 11 of the constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property, for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for city, county, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for, as already observed, the statute authorizing it required the tax, when collected, to be paid into the county treasury for the use of the county general fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the legislature; but the constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public or municipal corporations, the power to assess and collect taxes for those purposes."

But the important distinction between the California constitution and ours, and the California decision and that which we in-

tend to make, is that there is wholly absent from the California constitution a provision like the last sentence in section 1, article 12, viz: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." This sentence we have endeavored ¹⁴⁸ to construe above, and the construction which we place upon it, and the fact of its absence from the California constitution, render, in our opinion, the California decision inapplicable. Further than that, the California decision was not thoroughly considered, and was delivered by a divided court. The California constitution upon the subject of revenue made no such distinctions between the words "impose," "levy," "assess," and "rate" as we find to be clearly made in the constitution of Montana. It did not, as does ours, specially apply the one word to license taxes, and use the other words in referring to taxation strictly speaking. It cannot be argued that the prohibitory section in our constitution is borrowed from California, because, by comparing the language of the two, it is seen that they are different: See the two sections above quoted. The California prohibitory section uses the word "impose"; ours uses the word "levy." But the great distinction between the two constitutions, and the question of prohibition as contained in them, is in that last sentence of section 1 of our article 12, which we have heretofore fully discussed.

Furthermore, much is made by the defendant of the use of the word "inhabitants" in our section 4. He argues that when the section says, "shall not levy taxes upon the inhabitants or property," the word "inhabitants" means "persons." The same word is used in the California constitution, and the decision of *People v. Martin*, 60 Cal. 153, turns largely upon that word: See citations from that case, *supra*. Defendant's contention is, that the word "inhabitants" means "persons," as distinguished from property, and that section 4 contains both words, viz., "inhabitants" and "property," and therefore the prohibition is on both, as to levying taxes upon property and upon persons; and that the only kind of tax which could be levied upon persons would be the license tax, which is personal, while the tax upon property is not personal; and that, therefore, the use of the words "inhabitants" can mean nothing but a prohibition against the legislature levying the only kind of a personal tax, which is a license tax. This ¹⁴⁹ argument cannot be maintained, for this reason: that the distinction which the defendant seeks to make as to levying or assessing or imposing taxes upon persons or property is more appar-

ent than real, if, indeed, it is even apparent. The words "persons" and "property" are sometimes used indiscriminately, even in instruments of the gravest importance and dignity. But the fact is, that all taxes are levied upon persons, and not upon property. It is the person that is taxed or licensed. In case of taxation, strictly speaking, the property which the person owns is used to determine the amount of the tax which he shall pay; but it is the person who, after all, pays the tax, and not the property. The person is liable, and the property, in addition to being the means of determining what the person shall pay, is also a security for its payment.

Upon this subject Judge Grover of New York, said in *Rundell v. Lakey*, 40 N. Y. 516: "It is, I think, apparent from the various provisions of the statute that, in respect to both real and personal property owned by a resident of the town or ward where the former is situated, the tax is imposed upon the person of such owner on account of the ownership of such property, and his liability to such tax is conclusively fixed by the completion and delivery of the roll. The counsel for the appellant concedes that this is true as to personal property. I can see no substantial reason for a distinction between an assessment for real or personal property against an individual. Both are alike assessed to the owner. The tax is in both cases imposed upon the owner. Provision is made in both for the collection of the tax from the property of the owner by the collector of the town or ward."

It was also said in *Everson v. Syracuse*, 29 Hun, 486, by Judge Haight, then of the supreme court, and now of the court of appeals, in referring to *Rundell v. Lakey*, 40 N. Y. 516: "In that case the conveyance was made after the assessment, and before the tax was levied. The question was as to which of the parties was liable for the tax, the grantor or grantee. It was in that case held that the collector was not only authorized, but it was his duty, to collect the tax, if not otherwise ¹⁵⁰ paid, by seizing and selling the goods of the person against whom the tax has been assessed, or any goods in his possession; that the person against whom the tax was assessed was primarily liable; that the tax levied is not a tax imposed upon the land, but that it is imposed upon the person on account of his ownership of the land, and that he is primarily liable for the payment of it; that the tax, when levied, simply becomes a lien upon the land."

We take the following from *Green v. Craft*, 28 Miss. 70: "The

term 'taxes,' it is said, 'includes all contributions imposed by the government upon individuals for the service of the state.' The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment, when the owner shall be legally in default in paying at the time stipulated by law": See, also, Cooley on Taxation, 2d ed., 476.

It, therefore, being true that it is the person that is taxed, there seems to be no particular significance in the use of the two words "inhabitants" and "property" in section 4, article 12, of the constitution. While these two words are used, the subject matter is the same. And if the section refers, as we have endeavored to show that it does, to taxation of property, it was not important that the section uses the words "inhabitants" as well as "property," for the result is the same, and the taxation referred to meant a property tax; that is to say, a tax upon a person, levied upon the basis of the property owned by him.

Another argument in favor of the view that it was the intention of the constitution to commit the subject of license taxes to the legislature may, perhaps, be found in the fact of legislative construction. Ever since the adoption of the constitution, the legislature, either by allowing old laws to remain upon the statute books, or by enacting new ones, has recognized the principle that the subject of license taxes is for the legislature. The business of the state has been conducted ¹⁵¹ upon this principle during its whole history. We mention this matter, not as of great importance, but as entitled to some slight consideration. As noted by Judge Cooley in the citations from eminent jurists given in the earlier part of this opinion, it is not upon slight or doubtful considerations that a court will declare that the legislature has disobeyed the constitution.

Another matter of slight importance, but tending in the same direction, is the fact that this license system has been in this court several times, and while the question of its constitutionality has never been raised in any way, three decisions have been made which recognize it as a portion of the body of the state law, viz: *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27; *State v. Raymond*, 12 Mont. 226; *State v. Owsley*, 17 Mont. 94. All of those cases were presented by very able counsel, and any one of them could have been determined upon the alleged un-

constitutionality of the license tax law, if the question had been raised. We do not, however, present this matter as one of any particular weight, for it is not entitled to such consideration.

There are a few other matters which have been mentioned as reasons for sustaining the demurrer to this complaint. But little has been made of them by counsel, and we do not think even the respondent regarded them as important. We think the additional points so made are not well taken, but will not discuss them. The great question in the case and that upon which both counsel rested their whole contention, is the constitutional matter which we have decided. That matter, after mature deliberation, we consider clear. Furthermore, we consider it absolutely clear that the unconstitutionality of the law in question is not so apparent as to justify this court in declaring the license law void. The judgment of the district court is reversed, and the case is remanded, with directions to overrule the demurrer, and proceed with the case.

Pemberton, C. J., and Hunt, J., concur.

STATUTES MUST BE UPHOLD AS CONSTITUTIONAL, unless their unconstitutionality is made to appear beyond a reasonable doubt: *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513; 55 Am. St. Rep. 149, and note.

LICENSE LAWS—POWER OF LEGISLATURE TO PASS.—The legislature is not prohibited from enacting license laws by section 13, article 11, of the constitution of California, declaring that taxation shall be equal and uniform: *People v. Naglee*, 11 Cal. 232; 52 Am. Dec. 312, and extended note fully discussing the subject.

CONSTITUTIONS—CONSTRUCTION.—In the construction of written constitutions, courts are to be governed by the purpose of the framers: *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711. See, also, the extended note to *Schuessler v. Dudley*, 60 Am. Rep. 128.

BERKIN v. MARSH.

[18 MONTANA, 152.]

GUARDIAN AND WARD—DISCHARGE OF GUARDIAN, WHAT IS.—Within the meaning of a statute of limitations providing that no action can be maintained on any bond given by a guardian, unless commenced within three years from his discharge or removal, the death of the ward must be treated as the discharge of the guardian, and therefore an action against the latter's sureties must be commenced within three years after such death.

STATUTE OF LIMITATIONS, DISABILITY TO SUE, WHAT IS NOT.—The absence of a perfected cause of action does not constitute a disability to sue. Therefore, if a statute provides that actions upon a guardian's bond must be commenced within three years after a removal or discharge, unless at the time of the

discharge the person entitled to sue was under legal disability, the fact that no action could be maintained until the filing of the final report by the guardian and its confirmation by the court does not prevent the running of the statute of limitations.

STATUTE OF LIMITATIONS IN FAVOR OF SURETIES DOES NOT PROTECT PRINCIPALS.—A statute providing that no action may be maintained against sureties on any bond given by a guardian, unless commenced within the time designated therein, does not prevent the commencement and maintenance of an action against the principal after that time.

Action by Berkin, administrator of the estate of Valentine Thuma, deceased. The decedent, prior to his death, was insane, and the defendant Marsh was his guardian. The guardian filed his final account in April, 1891, and it was confirmed by the court on the second day of May in the same year, and it was found that the guardian had in his hands assets of his former ward amounting to more than ten thousand dollars. This action was commenced March 8, 1894, and was against Marsh and the sureties on his bond as guardian. All the defendants demurred upon the ground that the cause of action was barred by section 404 of the probate act. This section declared that: "No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of the discharge or removal of the guardian, the person entitled to bring such action is under legal disability to sue, the action may be commenced at any time within three years after such disability is removed." The demurrer was sustained as to all of the defendants, and judgment rendered in their favor, and thereupon the plaintiff appealed.

Cowan & Parker and Thomas J. Galbraith, for the appellant.

Edward C. Russell, for the respondents.

¹⁵⁵ DE WITT, J. This is a special statute of limitations, applied to sureties upon a guardian's bond: *Hudson v. Bishop*, 32 Fed. Rep. 519. Appellant contends that the cause of action here attempted to be stated arose only upon the filing of the final report by the guardian, and its confirmation by the court. It is not necessary to express an opinion upon this question. It may be conceded for the purposes of this decision that the cause of action arose only upon the confirmation of the guardian's final report. Upon this question see *Chaquette v. Ortet*, 60 Cal. 594; *Hood v. Hood*, 85 N. Y. 561; *Marlow v. Lacy*, 68 Tex. 154; *Perkins v. Stimmel*, 114 N. Y. 359; 11 Am. St. Rep. 659. But as above

noted, this statute of limitations is a special one. The time does not, as in ordinary statutes of limitation, commence to run at the accruing of the cause of action. On the other hand, it commences at the date of the discharge or removal of the guardian. In this respect the statute is specific. The inquiry, then, is, When was this guardian removed or discharged?

Upon a similar statute Chief Justice Shaw of Massachusetts said: "The defense relied on, by a surety on a guardianship bond to the judge of probate, is that it is barred by the statute of limitation. The provision in the Revised Statutes, chapter 79, section 26, ¹⁵⁶ is, "that no action shall be maintained against the suréties in any bond given by a guardian unless it be commenced within four years from the time within which this chapter shall take effect, or within four years from the time when the guardian shall be discharged,' with a proviso not material. The court are of opinion that by the term 'discharged,' in this statute, is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female, the arrival of a minor ward to the age of twenty-one, or otherwise": *Loring v. Alline*, 9 Cush. 68.

This case was approved in *McKim v. Mann*, 141 Mass, 507, in which the court said: "The ward's death effectually dissolves the relations of guardian and ward, and leaves upon the guardian the duty of a mere custodian of the property. He can no longer appear in court to defend a suit against the ward: *Whitney v. Whitman*, 4 Mass. 508. In ordinary cases of agency, if the principal dies, the agency is determined by mere operation of law; and it will make no difference, even though the power is declared in express terms to be irrevocable: *Marlett v. Jackman*, 8 Allen, 287, 294; *Story on Agency*, sec. 488. No reason is apparent why a guardian's power should survive the death of his ward. Like other agents whose authority has ceased, he must hold the property remaining in his hands until it can be delivered over, and must settle his accounts; but his guardianship is at an end. And we cannot doubt that the death of the ward is a discharge of the guardian, within the meaning of the Public Statutes, chapter 139, section 28."

Upon a similar statute of Michigan, Judge Campbell said: "The question then arises, what is meant by the discharge of a guardian? It is claimed by the defense that it means the termination of his official character. For the plaintiff it is claimed

that it means his discharge by final settlement. The only section of the statutes bearing on this question which have been called to our attention are Compiled Laws, sections 4816, 4836: Howell's Annotated Statutes, secs. 6308, 6328. The ¹⁵⁷ former provides that every guardian shall have the care and management of the estate, and continue in office until the minor reaches majority, 'or until the guardian shall be discharged according to law.' The latter section provides for the resignation and removal of guardians, which can only be done during the minority of the ward, and while there is, therefore, a disability to sue. It has been the uniform understanding that the office itself terminates in all cases when the ward comes of age, or ceases to be incompetent, and after that time the ward may settle with his guardian without the intervention of the probate court if he chooses, and the guardian can do no further act as guardian, but becomes discharged of his office": Probate Judge v. Stevenson, 55 Mich. 320.

Construing a similar statute in Wisconsin, Judge Shiras said: "The second question presented is, whether it appears that the action is barred by the lapse of time. The express provision of section 8968 is that 'no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time the guardian shall be discharged.' This is a special limitation for the benefit of sureties, and does not affect the right to recover from the guardian. The limitation begins to run 'from the time the guardian shall be discharged.' On part of plaintiffs it is argued that the guardian is not discharged until there has been a final accounting and settlement, and an order or judgment entered adjudging the amount due from the guardian, and ordering its payment. The construction would make the words 'shall be discharged,' equivalent to the terms 'final settlement of accounts.' Practically this may be, in the majority of instances, the time when the guardian is discharged. For instance, when the ward becomes of age, it is the duty of the guardian to settle his accounts, and turn over all property in his hands belonging to the ward. The fact that the ward comes of age does not, ipso facto, change the relation in which the guardian holds the property from that of a statutory trustee to that of a debtor. Holding the property of the ¹⁵⁸ ward, he is bound to exercise proper care thereof, and his duty and obligations will continue until he has duly accounted for and delivered up possession of the property. But is this true in case of the death of the guardian before the ward comes of age? In

such case, the personal care and management of the property by the guardian is at an end. Are the sureties on the guardian's bond to be held liable for the acts or negligence of others than their principal? Is not the guardian discharged when, by any reason, he is relieved from any further control over the property of the ward? Such a discharge does not relieve from liability from all past acts; but is he not discharged from further liability by reason of the fact that his power to control is at an end? The death of the guardian ends, of course, all personal control over the property. His estate becomes liable for all sums found due to the wards. If it is ascertained that at the date of the death of the guardian a certain sum was in the hands of the guardian, belonging to the wards, and the same is not paid, the sureties on the bond may be liable therefor; but, under the statute, suit thereon must be brought within four years from the discharge of the guardian, and it seems to me that death is such a discharge": *Hudson v. Bishop*, 33 Fed. Rep. 519. This decision was affirmed by Judge Brewer in 35 Fed. Rep. 820.

Harris v. Calvert, 2 Kan. App. 749, is a very recent case from Kansas upon this subject, and cites numerous authorities to the same effect. Among other things, the court said in that case: "This, then, brings us to the question, 'When does the guardian's term of office expire?'" This may occur in various ways. We will only notice two that are applicable to the case, viz: 1. The death of the guardian; 2. The ward becoming of age: 9 Am. & Eng. Ency. of Law, 95; 3 Kent's Commentaries, 221-227; *Stroup v. State*, 70 Ind. 495; *Overton v. Beavers*, 19 Ark. 625; 70 Am. Dec. 610; *Probate Judge v. Stevenson*, 55 Mich. 320; *People v. Brooks*, 22 Ill. App. 594; *Glass v. Woolf*, 82 Ala. 281; *Ross v. Gill*, 4 Call. 250; *In re Allgier*, 65 Cal. 228; *Klemp v. Winter*, 23 Kan. 699. In *Probate Judge v. Stevenson*, 55 Mich. 320, it is held: 'Guardianship ends when the ward becomes of age. The guardian then can do no further act as such, but is discharged of his office, and his ward may settle with him, if he chooses, without the intervention of a probate court, and the termination of a guardianship is equivalent to the discharge of the guardian.' "

We are therefore of opinion that the death of the ward terminated the relations of guardian and ward. In this case the ward judicially died on October 11, 1890, and, as far as the relations between guardian and ward were concerned, the guardian was then discharged or removed. He ceased to be a guardian. He, however, was not discharged from liability to account for

the property to the ward, or to the ward's estate: *Harris v. Calvert*, 2 Kan. App. 749; *Hudson v. Bishop*, 32 Fed. Rep. 519; 35 Fed. Rep. 820. But, his office of guardian ceasing, he was thus discharged or removed within the meaning of the statute of limitations, contained in section 404, as construed in the cases above cited. Therefore the statute of limitations (Probate Practice Act, sec. 404) in this case had run when the action was commenced, and the demurrer below was properly sustained, unless, in the language of section 404, "at the time of the discharge or removal of the guardian the person entitled to bring such action was under legal disability to sue." The question, therefore, is, Was the plaintiff in this case under a legal disability to sue prior to the filing of the guardian's account and its confirmation? Appellant claims that he was under such legal disability, for the reason that the cause of action had not yet arisen. We conceded above, for the purposes of this decision, that the cause of action did not accrue until the confirmation of the guardian's report: See cases cited on this point above. But is this a legal disability in the plaintiff? We think that it is not. A legal disability to sue pertains to the person desiring to sue. This subject was discussed by Judge Sawyer in *Meeks v. Vassault*, 3 Saw. 206, in which case the court said:

"This being so, it is insisted by plaintiff's counsel that, since neither he nor his grantors, the heirs of Harlan, could maintain an action for the recovery of the lands in controversy ¹⁶⁰ pending the administration, or until distributed by the probate court on November 6, 1869, they were under a legal disability to sue, within the meaning of section 191 of the probate act; and, the action having been brought within three years after the said distribution, that it is not barred. Section 191 is as follows: 'The preceding section shall not apply to minors or others under any other legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability.' The question is, What is the meaning of the phrase, 'any legal disability to sue,' as here used? This provision does not define the term 'legal disability.' It assumes that there are other disabilities known to the law, and we must go to the law as it existed outside of this section to ascertain what they are. The provision mentions 'minors,' and adds, 'or others under any legal disability.' Upon turning to the general statute of limitations, we find specified as disabilities infancy, insanity, imprisonment for crim-

inal offenses, coverture, etc., but neither in that nor in any other statute is anything of the kind now claimed as a disability named or recognized as such. The definition of 'disability' as given by Bouvier, is, "The want of legal capacity to do a thing": Bouvier's Law Dictionary. The disability may relate to the power to contract or to bring suits, and may arise out of want of sufficient understanding, as idiocy, lunacy, or want of freedom of will, as in the case of married women and persons under duress; or out of the policy of the law, as alienage when the alien is an enemy, outlawry, attainder, praemunire, and the like. The disability is something pertaining to the person of the party—a personal incapacity—and not to the cause of action, or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. In this case there was no want of power or capacity in the person. The difficulty is in his relation to the subject matter of the suit": *Meeks v. Vassault*, 3 Saw. 206.

We may turn to our own statute, as did Judge Sawyer to ¹⁶¹ that of California, and ascertain what are generally legal disabilities to sue. Section 39 of the Code of Civil Procedure provides as follows:

"Section 39. If a person entitled to commence an action for the recovery of real property, or for the recovery of possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title descends or accrues, either: 1. Within the age of majority; or 2. Insane; or 3. Imprisoned, on a criminal charge, or in execution, upon conviction, of a criminal offense for a term less than for life; or 4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense."

We notice the following definitions of "disability" in law dictionaries:

"Disability: The want of legal ability or capacity to exercise legal rights either special or ordinary, or to do certain acts with proper legal effect, or to enjoy certain privileges or powers of free action. At the present day disability is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus married women, persons under age, insane persons, and felons convict are said to be under disability. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage, or the restraints placed upon clergymen by reason of their spiritual avocations. Disability is either gen-

eral or special; the former when it incapacitates the person for the performance of any legal acts of a general class, or giving to them their ordinary legal effect; the latter when it debars him from one specific act": Black's Law Dictionary.

"Disability: The absence of legal ability to do certain acts or enjoy certain benefits; such as the disability to sue, take lands by descent, to enter into contracts, to alien property, etc.

"Section 3. As a rule, 'disability' means a general disability, especially a disability to sue: Coke on Littleton, 128 a. Disabilities of this kind are of importance with reference to the statutes ¹⁶⁸ of limitation and relating to adverse possession (q. v.), which allow persons under certain disabilities an extended time within which to enforce their right. Statutes 3 & 4 William IV, chapter 27, section 16, includes 'absence beyond seas' (q. v.), in the list of disabilities, although it is, strictly speaking, only a disadvantage or 'impediment,' as Statutes 21 James I, chapter 16, section 4, rightly calls it": Rapalje and Lawrence's Law Dictionary.

"Disability: Incapacity for action under the law; incapacity to do a legal act. A personal incapacity, and may relate to powers to contract or to sue, and arise from want of sufficient understanding, as in cases of lunacy and infancy; or for want of freedom of will, as in case of coverture and duress; or from the policy of the law, as in cases of alienage, outlawry, and the like": Anderson's Law Dictionary.

The accruing of the cause of action is not personal to the plaintiff proposing to sue. It is not a disability on his part. If it be objected that we are thus holding that the statute of limitations commences to run before the cause of action arises, the answer is simply that this statute of limitations is different from the ordinary ones, and specifically provides that which is unusual, viz., that the limitation shall commence at the discharge or removal of the guardian, and not at the time of the accruing of the cause of action. The matter was treated in the Michigan case above cited (Probate Judge v. Stevenson, 55 Mich. 320), in which the court said: "There is, therefore, no hindrance in the way of seeking an accounting, and a guardian is bound to be ready to account as soon as his trust comes to an end. The remedy to compel accounting is summary, and cannot generally consume much time. And inasmuch as a failure to account is as much a breach of duty as a failure to pay over money, the cases cannot be very numerous in which a recourse to the bond cannot be had within

the statutory period. The discharge cannot very well have more than one of two meanings. It must mean either the end of the guardianship office, or the discharge from liability. It cannot mean the latter, because that would preclude any occasion for resort to the bond. The object of the statute ¹⁰³ was evidently to make a uniform rule of limitation; and it is long enough to prevent injustice in both cases, if not universally."

If it should be held, when occasion arose, that the cause of action did not accrue until the filing and confirmation of the guardian's final report, still the period of limitation would be very little reduced, for the reason that the accounting of the guardian could be compelled within a very short time, and after such accounting and confirmation ample time would remain within the period of limitation in which to commence the action after the same had accrued. In any event, this is a question of positive statutory law, and a matter in which the legislature has exercised its discretion in making this provision.

We are, therefore, of the opinion that the demurrer was properly sustained as to all these defendants who were sureties on the guardian's bond. But the provision of this statute (section 404) is a limitation for the benefit of the sureties, and not the principal: *Hudson v. Bishop*, 32 Fed. Rep. 519. Section 404 would not bar the action as against the principal, the defendant Marsh. The demurrer did not plead that the action was barred as to Marsh, although counsel signed the demurrer for Marsh and the sureties. There was, therefore, nothing in the demurrer for which it should have been sustained as to Marsh. The judgment in favor of all defendants except Marsh will be affirmed. As to Marsh, the case is remanded, with directions to set aside the judgment in his favor and overrule the demurrer.

Pemberton, C. J., and Hunt, J., concur.

GUARDIAN AND WARD.—THE DEATH OF THE WARD DISCHARGES the guardian: *Norton v. Strong*, 1 Conn. 65; *Bean v. Bumpus*, 22 Me. 549. To the same effect, see *McKim v. Mann*, 141 Mass. 507.

STATE v. BUTTE CITY WATER COMPANY.

[18 MONTANA, 199.]

PLEADING—DENIAL FOR WANT OF INFORMATION.—A denial stating, with respect to a specified allegation of the complaint, that the defendant has no knowledge or information upon which to found a belief, and therefore he denies the same, is insufficient to form an issue. If the complaint is verified, the denial of each allegation must be specific, and made positively or according to the information and belief of the defendant.

WATER COMPANY—DUTY TO FURNISH WATER TO ALL PERSONS.—A water company having a franchise in a municipality entitling and requiring it to supply the inhabitants thereof with water for general use, at prices specified in the grant of the franchise, has no authority to adopt and enforce a rule that it will deal only with the owners of property for which water is required. A tenant of such property, whether his lessor agrees to become responsible or not, is entitled to a writ of mandate to compel the furnishing of water to such tenant upon his tender of the amount which the company is entitled to charge therefor.

Application for a writ of mandate to compel the defendant corporation to furnish the relator with water to be used on premises occupied by him as a tenant, he having first tendered payment of the water rates for three months in advance. The refusal to furnish the water was based upon a rule alleged to have been adopted by the defendant to the effect that it would contract only with the owners of property and their authorized agents, and that the property should be held for water rents; that the owner of the premises, one Murray, when they were connected with the mains, had signed an application to be supplied with water, subject to the rules and regulations of the defendant and with full knowledge of the existence of the regulations upon which the defendant relied; that when the relator made demand for water, Murray, as owner of the premises, refused to become personally responsible for the water rents, or to have his property held for them. Judgment in favor of the applicant, on the pleadings, and the defendant appealed.

Corbett & Wellcome, for the appellant.

George Haldron and Oliver M. Hall, for the respondent.

203 HUNT, J. The appellant contends that there was an issue of fact tendered by the answer of respondent upon the question whether relator was or was not a tenant in possession of the premises involved. But we think that the denial of respondent, that "as to whether relator is a tenant in possession of the said premises, it had no knowledge or information upon which to found a belief, and therefore denies the same," was not good un-

der the Compiled Statutes of 1887 (Code Civ. Proc., sec. 89). The court required a specific denial of the material allegations of the complaint controverted by the defendant. "If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant."

While there are cases and authors holding a denial such as respondent's good under codes quite similar to the Montana code of 1887, in California this exact question was long since decided by Justice Field for the supreme court of that state, in *Curtis v. Richards*, 9 Cal. 34, where it was said of a denial like appellant's, "There are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue: 1. Positively, when the facts are within his own personal knowledge; and 2. Upon information and belief, when the facts are not within his own personal knowledge: Practice Act, sec. 46. These forms cannot be indiscriminately used. If the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion. Thus, for example, in ²⁰⁴ reference to instruments of writing alleged in a complaint to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description or copy in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals: Practice Act, sec. 446. If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information and belief. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided that an allegation of the complaint must be controverted by a denial 'of any knowledge thereof sufficient to form a belief.' In practice this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illus-

trated in the present case": See, also, *San Francisco Gas Co. v. San Francisco*, 9 Cal. 467, where, on rehearing, the court adhere to the rule established in *Curtis v. Richards*, 9 Cal. 34.

The Montana Practice Act, as it appears in the laws of 1887, having been principally taken from California, and having been modified in its requirements of what a denial must contain, and how it must be made, after the decision of the supreme court of the United States in *Maclay v. Sands*, 94 U. S. 586, reversing *Sands v. Maclay*, 2 Mont. 35, the construction of the California code should have great weight in the construction of similar provisions of our practice act.

Bliss on Code Pleadings, section 326, says: "The pleader is not permitted to evade the statute. He must deny directly and ²⁰⁵ positively, or must deny, in the language of the statute, 'according to his information and belief.' To say that 'he has not sufficient knowledge to form a belief,' and therefore denies, will not do; nor will it be permitted to 'deny for want of information to enable them to admit'": Pomeroy on Code Remedies, sec. 640; Estee's Pleading and Practice, sec. 3224.

The supreme court of South Dakota, in *Cumins v. Lawrence Co.*, 1 S. Dak. 158, held that a denial, such as appellant has made in the case at bar, is not a denial of any fact averred, "but is a mere denial of any knowledge or information as to the alleged facts sufficient to form a belief in respect to their existence or nonexistence," and, of itself, is no defense. By statute of that state, however, such a denial is expressly authorized, and, by virtue of the statutory permission, that form of denial is held good. Maxwell on Code Pleading, page 386, holds such denials good, but he does not refer to the California cases, and relies upon the single case of *State v. Commissioners of Hancock Co.*, 11 Ohio St. 183, to sustain his text. But it is evident, from an inspection of the Ohio case, that the statute in force was different from that of California and Montana.

It is observed that the new codes of 1895 extend the method and form of denials, giving far more latitude, apparently, than under the former practice: Code Civ. Proc. 1895, sec. 690. We shall follow the California cases, and hold that the statutory form of denial was the only one to be sustained. The denial, therefore, being insufficient, and no issues of fact being presented, the question for determination is: Can the appellant water company refuse to supply relator with water for general purposes at the premises involved?

The appellant is a water company, engaged in supplying the inhabitants of the city of Butte with water, under its franchise. The city gave the corporation the right to lay its mains in its streets and alleys. The company, on the other hand, is required to supply the inhabitants of the city of Butte with water for general use, at prices specified in the franchise granted. The relator is an inhabitant of Butte, occupying ²⁰⁶ premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water upon the ground that, "by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners?" We say not.

The performance of the duty the company undertook when it accepted the franchise granted was to supply the inhabitants of the city with water. "A waterworks company is a quasi public corporation. It must supply water to all who apply therefor and offer to pay rents": Cook on Stocks and Stockholders, sec. 932. The account on which the grant was given was a public purpose: *Lumbard v. Stearns*, 4 Cush. 61. Therefore, "the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made": Morawetz on Private Corporations, sec. 1129.

The view that supplying a city and its inhabitants with water for general purposes is a business of a public nature, and meets a general necessity, is sustained by the great weight of authority reviewed in a learned opinion of Lord, C. J., in *Haugen v. Albina etc. Water Co.*, 21 Or. 411. It was there said: "The defendant, by incorporating under the statute, for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise belonging to the public, and not enjoyed of common right, for the accomplishment of public objects, and the promotion of public convenience and comfort. Its business was not of a private, but of a public, nature, and designed, under the conditions of the grant as well for the benefit of the public as the company."

Certainly, the company may make reasonable rules and regulations. ²⁰⁷ Doubtless it may require payments in advance for

a reasonable length of time. It may, within reasonable limitations, cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times, or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house in need of water for general purposes.

Whether the owner has made a contract with the corporation to hold himself personally liable or not, or whether he has signed any paper agreeing to subject his property to a lien for water rents, we will not discuss in this case. The water company in no case, however, can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and if it has adopted a by-law that is in conflict with its franchise, which may be termed its constitution, or is unreasonable or oppressive, the subordinate rule or by-law will be set aside: *Thompson on Corporations*, sec. 1010 et seq.

This relator was entitled to water, and to a receipt for his payment, issued directly to him, and to have the amount of his payment credited to him alone, and the by-law pleaded by the company is, as to him, clearly unreasonable; and it is immaterial to his rights whether the owner had any agreement with the company or not, or whether, as tenant, he knew of the existence of any such agreement. The duty of the company, under its franchise, and undertaken to be fulfilled, must be performed. The order appealed from is affirmed.

Pemberton, C. J., concurs.

De Witt, J., not sitting.

WATER COMPANIES—DUTY TO FURNISH WATER.—A water company having a franchise to furnish water to a city and its inhabitants assumes a public duty, part of which is to furnish water to all such inhabitants at reasonable rates and not to charge any of them prices not charged to all others for a like service and under similar conditions: *American Water Works Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610.

McSHANE v. KENKLE.

[18 MONTANA, 208.]

MINING LAWS—DISCOVERY SUFFICIENT TO JUSTIFY THE LOCATION OF A QUARTZ CLAIM.—It is not essential, in order to sustain the location of a mining claim, that the vein discovered contain mineral, quartz, or ore of such a nature that a practical miner, if he encountered it, would feel justified in following it up, and developing it. An instruction to this effect is erroneous. If the rock discovered is in place, and carries enough precious metal in it to justify the locator in expending time and money in prospecting and developing the ground located, the discovery is valid, and a location thereof may be made, no matter what the locator's vocation may be.

MINING LAWS—DISCOVERY, WHAT IS.—When a locator finds rock in place, containing mineral, he has made a discovery within the meaning of the statute authorizing the location of mining claims, whether the rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes a discovery, and warrants the prospector in making a location of a mining claim. Nor need the locator expect to find a paying mineral in the particular crevice, vein, or seam in which he finds the rock in place. It is sufficient that he expects by following up that crevice, vein, or seam to find a main body of ore of commercial value within the ground located.

JURY TRIAL.—INSTRUCTIONS SHOULD AVOID ANY STATEMENT OF THE EVIDENCE which may indicate the conclusions of the judge respecting the facts directly disputed on the trial.

Suit to determine adverse claims to mining ground. The plaintiffs' title was founded on a location made May 12, 1891, called the Grafton Lode. The defendants relied upon a like location, made December 10, 1889, called the Silver Safe Lode. Part of the same ground was located in April, 1890, by Peter Rush, as a stone quarry. He conveyed to Condon on November 10, 1890, who, in April of the same year, had become an owner in the Silver Safe Lode, and so continued until September, 1893, when he conveyed to Kenkle, one of the defendants in the present action. On the trial it was claimed that the work done by Condon in December, 1890, in the Rush stone quarry amounted to an abandonment of the claim under the Silver Safe Lode, and that the original discovery upon which that claim was located was not sufficient. The jury returned a verdict for the plaintiffs, and a motion for a new trial was made by the defendants, which, being denied, they appealed.

Max Waterman and H. G. McIntire, for the appellants.

Toole & Wallace, for the respondents.

209 HUNT, J. The principal question in this case turns upon the instructions. The court, after stating to the jury that three steps are indispensable to a valid location of a mining claim—to wit: 1. A discovery; 2. A marking of the boundaries; and 3. A record—charged in relation to a discovery as follows:

“On this point you are advised that, to make a discovery the would-be locator must have found a vein or crevice of mineral-bearing quartz, rock, or ore in place, with at least one well-defined wall. A vein or crevice is said to exist when ore is found within defined boundaries, and, if the boundaries are well defined, slight evidence of ore may be sufficient; while, on the other hand, a clearly defined ore body, with one well-defined wall, will be enough. The matter within the boundaries must be mineral-bearing quartz, rock, or ore; and, before a sufficient discovery to justify a location can be said to have ²¹⁰ been made, there must have been found a vein, the course of which can be readily determined through the surrounding rock, and that this vein *must contain mineral, quartz, or ore of such a nature as that a practical miner, if he encountered it, would feel justified in following it up, or developing it, from the reasonable expectation of finding paying mineral as the result of his developing the vein; so that mere water cracks or seams in the native rock or a mere stringer or offshoot, would not necessarily constitute a discovery. In other words, if there was not enough found to justify a practical miner in entertaining a reasonable hope of finally encountering paying mineral in this particular crevice or vein, by developing or following it, then what was found would not be a discovery in law—would not justify a location—and any location made thereon would be invalid. And this discovery must be so made before the boundaries are marked, for a location void when made, for want of ‘sufficient discovery’ as above defined, could not be made good by the locator afterward finding what would be in law considered a good discovery.”*

The court afterward stated and elaborated the plaintiffs’ contention by the following instruction: “The plaintiffs insist that the ground was open to location in May, 1891, for these reasons: First, while admitting the marking of the boundaries and record of the Silver Safe in December, 1889, they say that there was not, by Brooks or his colocator, before they marked their boundaries, any such discovery as the law requires, i. e., as a *practical miner* would have felt justified in developing, with the reasonable expectation of finally finding paying mineral in *that particular*

seam. They also insist that the persons claiming under the Silver Safe claim abandoned their claim in the fall of 1890, and tried to secure the ground under a different location, called the Rush placer or stone quarry claim; and they further say that the Silver Safe claimants forfeited their claim, if any they ever had, by failing to perform one hundred dollars' worth of work or improvements on and for the benefit of the Silver Safe location in the year 1890."

211 In the use of words (*italicized by us, for better illustration*) restricting a discovery to such a crevice or vein as a practical miner alone would have felt justified in developing, with the reasonable expectation of finally finding paying mineral in that particular seam, the court clearly erred. The error was not alone in laying down a rule limiting a valid discovery to such as a practical miner would feel justified in developing, with reasonable expectation of finding ore of commercial profit, present or prospective, but extended as well to the language of the charge which limited such justification to the expectation that paying mineral would be found in that particular seam upon which a discovery was made.

The statutes of the United States (Rev. Stats., secs. 2319, 2320), and the interpretations placed upon them by the supreme court, so far as we are advised, have never required as a prerequisite to the location of a mining claim that a locator discover rock in place bearing any of the precious metals named in the statute sufficient to justify persons pursuing any particular phase of any particular occupation in life only, as distinguished from any others, in expending time and means in prospecting and developing the ground within the limits of the location.

Any person may become a prospector by exploring a region of country for mineral; any person qualified by reason of citizenship in the United States may make a valid location of a mining claim by compliance with the law; and if the rock discovered by such a person is in place, and carries enough precious metal in it to justify the locator in expending his time and money in prospecting and developing the ground located, such a discovery is valid, and a location thereof may be made, no matter what the locator's vocation may be. The law does not discriminate. Its justification to locate extends to any citizens complying with its requirements; not only to the miner, whose experience lies in years of toil, but to the geologist, whose life has been in books of science, and to any other citizen, regardless of his calling.

When the validity of a mining location is assailed upon the ²¹² ground of no sufficient discovery, and there arises a question of whether the locator was justified in expending his time and money in prospecting and developing the ground located, then, of course, the testimony of mining men, including practical and scientific miners, geologists, and mineralogists, is most valuable, to the end that the court and jury may correctly determine if the locator has made a discovery of rock in place carrying precious metal sufficient to warrant his expending time and money in prospecting and developing his located ground. Such testimony fixes the character of the rock, the nature of the vein or seam or crevice, the formation of the country about, whether there is a well-defined wall or not, the probabilities of the result of future development work, and in other material ways assists the court or jury in arriving at a just conclusion as to the existence or non-existence of the facts plainly essential as bases for such justification. But, if the justification is found, it is a justification to the locator by reason of the existence of facts, mineralogical and geological; while, if such facts exist, the justification exists, and whether or not it is such a justification as the practical miner would avail himself of is not of vital import.

We find in the case of *Book v. Justice Min. Co.*, 58 Fed. Rep. 106, a discussion of what constitutes a "discovery" within the meaning of the United States statute. More than ordinary respect is due to the opinion because it is rendered by Judge Hawley, who enjoys in a peculiarly high degree the respect of the courts and bar alike for his great learning upon the law of mining rights. We quote as follows from the opinion:

"What constitutes a discovery of a vein or lode, within the meaning of the statute? Section 2320 of the Revised Statutes provides that 'mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall ²¹³ not exceed, fifteen hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The words, 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the

first section, and to have the same meaning, viz., a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. The statute was intended to be liberal and broad enough to apply to any kind of lode or vein of quartz, or other rock-bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place bearing any of the precious metals named therein, sufficient to justify the locators in spending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts, the veins, lodes, and ore deposits are so well and clearly defined as to avoid any question being raised. In other localities, the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a 'discovery,' within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

It will be observed that throughout the language of Judge ²¹⁴ Hawley he does not establish any standard of judgment by which to warrant a justification, except the existence, and expected existence, of geological or mineralogical facts from which certain reasonable conclusions are authorized to be drawn. The probable conduct of the practical miner or his beliefs are not regarded as rules or tests of the justification for the guidance of locators. Indeed, throughout his whole succinct and carefully considered statement of the law, as quoted, the learned judge does not use the word "miner" at all, but lays stress upon the liberality of the statute, which protects the locator in his discovery and location if rock in place is found containing precious metals, sufficient to justify such locator in prospecting and developing the ground located.

Nor must the discoverer expect to find paying mineral in that particular crevice or vein or seam in which he finds his rock in place bearing metal, before he can make a valid location. This is plain by a study of Judge Hawley's opinion, by the law generally, and by the light of common knowledge. If a prospector in a mining region discover a seam with a well-defined wall, bearing indications of mineral sufficient to justify him in spending his time and money in following it, in expectation of finding a main body of ore of commercial value within the ground located, a valid location of a mining claim may be made, and the expectation need not be confined to finding paying mineral in the particular seam upon which the discovery is made.

Judge Beatty, of Idaho, in *Montana Cent. Ry. Co. v. Migeon*, 68 Fed. Rep. 811, after quoting from *Book v. Justice Min. Co.*, 58 Fed. Rep. 106, said that the late decisions establish "the liberal rule that it is not necessary to the location of a valid claim under section 2320 that ore of commercial value in either quantity or quality must first be discovered within its limits. While the practical observer will commend this rule, it must be reasonably applied. To apply it to every seam or fissure which may be filled with matter containing traces of the precious metals, whether in or remote from mineral country, whether valuable or worthless as a mining claim, would be a perversion of a ²¹⁵ liberal law. The vein or lode which the statute directs must be discovered before the location of a claim must be one that, from all its indications, has a present or prospective commercial value, for only 'lands valuable for minerals' are subject to appropriation as mineral claims."

The case at bar well illustrates the force of these views. It is in evidence that in the vicinity of the Silver Safe location, at Neihart, the veins increase as they go down; that the seams (sometimes called "stringers" in that district) are regarded as in close proximity to larger veins of mineral; that they are usually supposed to lead to veins, but sometimes lead from them; that in that camp some ore-producing mines, particularly one large producer, were only two or three inches wide in their main veins at the surface. This evidence tends to show that the district is one where the mineral is found in seams "the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established": *Book v. Justice Min. Co.*, 58 Fed. Rep. 106.

Oftentimes, in such districts, a discovery is made on a "seam," a term often used synonymously with "stringer," and commonly understood by miners to be a crack or crevice filled by mineral deposit, and occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value. Upon such a seam the evidence in this case tends to show the Silver Safe discovery was made, and, if so made, the location thereof was valid in law.

The pleadings do not positively aver an abandonment of the defendant's location, but testimony was introduced upon that point, and instructions were given covering the law of abandonment. Whether it is necessary to specially plead abandonment we will not decide. The latest utterance of the supreme court of California, citing earlier cases, is in *Trevaskis v. Peard*, 111 Cal. 599; where it was held that evidence of abandonment may be given without a special ²¹⁶ plea under a denial of title. Where, however, abandonment is relied upon, it is safer to plead it.

The appellants complain that the instructions assumed that certain testimony was given which was not. Without going into any discussion of the instructions complained of, we think that, under our practice, courts should avoid any statement of testimony so framed as to subject the instructions to any well-founded charge of being the court's conclusion from facts directly disputed on the trial.

The defendants' objection to the form of the verdict could not have operated to their prejudice in this action.

Judgment and order denying a motion for a new trial reversed, and cause remanded, with directions to grant a new trial.

Pemberton, C. J., concurs.

MINES—DISCOVERY.—It is not essential to the validity of the location of a mining claim that the discoverer should have found, prior to his location thereof, that the lode contained mineral deposits of sufficient value to justify work to extract them; it is sufficient if mineral deposits be discovered of such value as to at least justify the exploration of the lode in expectation of finding ore sufficiently valuable to work: *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309; citing *Weibbold v. Davis*, 7 Mont. 107. See, also, *Morrison's Mining Rights*, 9th ed., page 28, where the principal case is cited.

MERCHANTS & MINERS' NATIONAL BANK v. BARNES.

[18 MONTANA, 335.]

AN ACTION OF ASSUMPSIT FOR MONEYS HAD AND RECEIVED is an equitable remedy existing in favor of one person and against another, when that other has received moneys either from the plaintiff or from a third person under such circumstances that in equity and good conscience he ought not to retain the same, and which, *ex aequo et bono*, belong to the plaintiff.

EQUITABLE ASSIGNMENT, ASSENT OF DEBTOR NOT ESSENTIAL TO.—If one in whose favor a debt exists, or is to exist in the future, as where it is to arise from a contract already made or an arrangement already entered into, gives an order to another for the money so due, or to become due, the assent of the debtor is not necessary to the operation of such order as an equitable transfer of the fund as soon as it is acquired.

GARNISHMENT AND EQUITABLE TRANSFER, CONFLICT BETWEEN.—An order given on a debtor for the payment to the person in whose favor the order is drawn of a debt then existing, or in potential existence, though not accepted, takes precedence over a subsequent garnishment of the same debt.

GARNISHMENT, OFFICER'S LIABILITY FOR MONEYS IMPROPERLY PAID TO HIM.—If, upon the service of a garnishment, the person garnished answers that he is indebted to the judgment debtor, and pays the amount of the debt to the officer, it having before such garnishment been assigned to another and the debtor notified of the assignment, the assignee cannot maintain an action against the officer to whom such payment is made. He is justified in receiving payment, and applying it upon the writ, and the remedy of the assignee is against the original debtor, who remains liable notwithstanding the payment, because he cannot, after notice of the assignment, relieve himself from liability by payment to a person other than the assignee.

GARNISHMENT, PAYMENT UNDER, WHEN DOES NOT RELIEVE DEBTOR.—A debtor having notice of the assignment of a debt made by his creditor cannot, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee.

Assumpsit by the Merchants' & Miners' National Bank against Barnes, a constable. The defendant, under a writ against one Tyler, had about March 1, 1894, garnished the Granite Mountain Mining Company. Before that time the company had entered into a contract with Tyler for hauling wood, but the contract was not completed until March 15, 1894. In January, 1894, and after entering into the contract with the mining company, plaintiff had given an order to the plaintiff wherein he directed the mining company to deliver to the plaintiff the check to become due on March 15th for hauling wood. When the order was presented by the plaintiff to the mining company, it did not then accept it, for the reason that no moneys were then due Tyler, but it agreed that if Tyler would indorse the check to be given him in payment of the contract for hauling wood, it would deliver

the indorsed check to the plaintiff. The plaintiff, before the money was paid to the defendant as constable, demanded payment thereof from the mining company, and notified the defendant of its claim to the money. The money was, nevertheless, by the mining company paid to the defendant, who applied it to the satisfaction of the judgment under which the garnishment was levied. The trial court gave judgment in favor of the defendant, and the plaintiff appealed.

R. H. Whitehill, for the appellant.

Durfee & Brown, for the respondent.

337 HUNT, J. An action of assumpsit, for money had and received, is a remedy equitable in its nature, existing in favor of one person against another, when that other person has received money, either from plaintiff or a third person, under such circumstances that, in equity and good conscience, he ought not to retain the same, and which, *ex aequo et bono*, belongs to plaintiff: *Buel v. Boughton*, 2 Denio, 91; *McFadden v. Wilson*, 96 Ind. 253; *Lockwood v. Kelsea*, 41 N. H. 185; *Laport v. Bacon*, 48 Vt. 176.

338 The old doctrine of the common law, that no action of contract can be maintained unless there is privity of contract between plaintiff and defendant, no longer generally prevails. Thus under the common law, as illustrated by the facts of this case, the mining company being indebted to Tyler, and Tyler having given an order to the bank for moneys due on such debt to this plaintiff bank, the bank could maintain no common-law action against the mining company to recover the amount, unless the mining company had assented to the appropriation, and promised, either expressly or by implication, to pay the money; and in such case the action would not be based upon any property or interest in the fund acquired by the bank through the order, but upon the mining company's promise to pay.

But the equitable rule is different. By it an interest in the fund is recognized, and this interest arises through the order, which operates as an assignment, and generally permits such interest to be enforced by suit, even where the debtor upon whom the order has been drawn has not assented to the transfer. In this case, therefore, if the mining company, as a debtor of Tyler, held money which it was bound to pay to Tyler, and if Tyler agreed with the plaintiff bank that the money should be paid to the bank, and gave to the bank an order upon the mining com-

pany for the money, this order creates an equitable interest or property in the fund, in favor of the assignee, the plaintiff bank; and it was not necessary that the mining company should consent or promise to hold the money for, or pay it to, the plaintiff bank. This doctrine is applied in cases where the debt actually exists, or where it exists in futuro. As stated by Pomeroy (Pomeroy's Equity Jurisprudence, sec. 1283): "The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being; if it exists potentially—that is, if it will, in due course of things, arise from a contract or arrangement already made or entered into when the order is given—the order will operate as an equitable assignment of such fund as soon as it ³³⁹ is acquired, and will create an interest in it which a court of equity will enforce": *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515; *McFadden v. Wilson*, 96 Ind. 253; *Macomber v. Doane*, 2 Allen, 541; *Tripp v. Brownell*, 12 Cush. 376. The order given, therefore, by Tyler to the plaintiff bank upon the mining company was a valid assignment of property to be acquired in the future, and created in the bank an interest in the fund to be acquired, which equity may enforce.

Nor do we doubt the general doctrine contended for by appellant, that a plaintiff may waive an action in tort, and sue in assumpsit, where the property has been wrongfully taken, and converted into money. "If a man," says Addison on Torts, "has taken possession of property, and sold or disposed of it, without lawful authority, the owner may either disaffirm his act, and treat him as a wrongdoer, and sue him for a trespass or for a conversion of property, or he may affirm his acts, and treat him as his agent, and claim the benefit of his action, and if he has once affirmed his acts, and treated him as his agent, he cannot afterward treat him as a wrongdoer; nor can he affirm his acts in part, and avoid them as to the rest. If, therefore, goods have been sold by a wrongdoer, and the owner thinks fit to receive a price therefor, he ratifies and adopts the transaction, and cannot afterward treat it as a wrong."

But it is unnecessary to enter into any discussion of this doctrine in this particular action, because, under the facts, we do not think that the remedy pursued by the plaintiff is correct. If the case were one where specific property in the hands of the mining company had been levied upon by the constable under his writ, and he had levied with notice of the assignment by Tyler

to the plaintiff bank, and had sold the specific property claimed by the bank, doubtless the action would lie, and the case of *Young v. Marshall*, 8 Bing. 43, would control, upon the principle that the sheriff having sold particular goods under a writ of fieri facias, with notice of a previous assignment by the defendant, and having paid over the proceeds of the sale to the plaintiff, an action for money had and received ³⁴⁰ might be maintained to recover the proceeds of the sale of the specific property. In that case, it was urged that the property was changed by the sale, but it was held by Alderson, J., that while the property was changed by the sale, as between a purchaser and the party against whom the execution has issued, yet it was not changed as against a party whose goods had been wrongfully taken. The same rule is sustained in *Notley v. Buck*, 8 Barn. & C. 86. But the case at bar is different. Here Merrell & Co. placed a writ in the hands of the defendant, as constable, commanding him to attach the debts due to Tyler by the Granite Mountain Mining Company. Acting strictly in pursuance of the authority of this writ, the constable served the necessary notices upon the mining company, telling them that all funds in their hands due to Tyler were attached to satisfy the claim of Merrell & Co. The mining company, although it knew of the assignment or order of Tyler, responded by confessing that it had money in its hands belonging to Tyler. The officer was not obliged, under such circumstances, to disregard the acknowledgment of the company, and to desist from further proceedings under his writ. When the execution was levied, the company, although notified of the bank's claim, without objection or protest of any kind on its part, paid the officer the amount of the claim of Merrell & Co. It thus again admitted an indebtedness to Tyler. These acknowledgments and acts were sufficient to protect the officer from liability in this suit. Under such circumstances the answer of the garnishee was properly taken as true by the officer, and in the absence of any mistake, fraud, collusion, or deception, the constable who proceeded under his writ of execution was not obliged to decline the money which the mining company confessed it owed to Tyler, even though he was notified by the bank of the assignment by Tyler to the plaintiff: *Haase v. Corbin*, 2 Mont. 409; *Kelley v. Tibbals*, 53 Pa. St. 408; *Coombs v. Davis*, 2 Wash. Ter. 466; *Shinn on Attachments*, sec. 640; *Drake on Attachment*, sec. 651 et seq. Of course, this confession of the mining company and payment to the constable in no way discharged its debt to the plaintiff

bank ³⁴¹ in this case, under the order executed in favor of the bank by Tyler: *Chamberlin v. Gilman*, 10 Colo. 94; *Coleman v. Scott*, 27 Neb. 77; *Freeman on Executions*, sec. 170. But, after the money collected under the execution has been paid to the creditors of Tyler, we cannot see how the conduct of the officer renders him liable to the bank, in equity and good conscience, for the payment of the sum so collected. He proceeded under the strict command of his writ, and knowledge obtained in legal manner.

St. Johns v. Charles, 105 Mass. 262, in some respects resembles this case. There *St. Johns* made a contract with *Charles* to cut brush for a hundred dollars in money and the loose wood on the lot. After *St. Johns* had begun the job, but, before it was accepted by *Charles*, *St. Johns* for a consideration signed and gave to *Taft* an order on *Charles* for all the money belonging to him for cutting the brush. *Charles* had notice of the order, and the contract was performed. Thereafter *Charles* was requested to pay the order to *Taft*, but neglected to do so. After suit was brought by *St. Johns*, *Charles*, without giving *Taft* any notice of it, paid *St. Johns* twenty-five dollars in money, and took his receipt in full for the contract. On the trial, *Charles* contended that he was discharged by reason of the receipt in settlement, and that the same was a complete defense, notwithstanding the order of *St. Johns*. But the court held that the settlement made between *St. Johns* and *Charles* was no bar or defense to the right of *Taft* to prosecute suit for his own benefit, that the effect of the order was to assign to *Taft* all the money that should be earned under the existing contract, and that the rights of *Taft* under the assignment after notice could not be defeated by a payment and discharge from the assignor.

It seems clear that the plaintiff's action lies against the mining company, but, after full consideration, we think that it would not be safe to hold an officer liable who proceeds, under proper mandate, to satisfy a judgment by accepting money acknowledged, as in this case, to be due from a garnishee to the defendant in the suit wherein the execution has issued, and ³⁴² where the money is paid, in accordance with such acknowledgment, and without objection, to the official.

The judgment and the order denying a new trial are affirmed.

Pemberton, C. J., concurs.

De Witt, J., not sitting.

ASSUMPSIT—NATURE OF ACTION.—An action for money had and received is equitable in its nature and lies generally whenever a bill in equity would lie: *Culbreath v. Culbreath*, 7 Ga. 64; 50 Am. Dec. 375; *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103. An action for money had and received may be maintained by one person against another, when the latter has money to which in equity and good conscience the former is entitled: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286; *O'Fallon v. Bolsmenu*, 3 Mo. 405; 28 Am. Dec. 678, and note; *Glascok v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299, and note. See, especially, the extended note to *Wells v. Brigham*, 32 Am. Dec. 751.

STATE SAVINGS BANK v. JOHNSON.

[18 MONTANA, 440.]

PENALTY, ACTION FOR, WHAT IS.—If, by the statutes of a state, the trustees or directors of a corporation become liable to its creditors for the amount of its debts upon the failure to make an annual report required by such statute, an action to enforce such statute must, within the meaning of the statute of limitations, be deemed an action for a penalty, and must, therefore, be commenced within the time specified in such statute for commencing actions to recover penalties.

CORPORATIONS, DIRECTORS' LIABILITY FOR NOT MAKING REPORTS—STATUTE OF LIMITATIONS.—If the trustees or directors of a corporation are required to make certain annual reports of its existing indebtedness and on default of doing so are made liable to its creditors for the debts due them, a cause of action accrues in favor of such creditors upon the first default, and the statute of limitations then begins to run against them, and the fact that after the completion of another year, a like default is committed on the part of the trustees does not give rise to a new cause of action as to indebtedness existing at the time of the first default, nor prevent the period allowed by the statute of limitations from being computed from such original default.

Action against the defendants, as trustees of the Bighole Lumber Company, a corporation, to recover indebtedness due to the plaintiff from such corporation. The liability of the defendants for such indebtedness was claimed to have resulted from their failure as such trustees to file annual reports of the indebtedness of the corporation. The indebtedness existing in favor of the plaintiff was of four different amounts, and accrued June 1 and June 10, 1891, and June 6 and August 1, 1892. The present action was commenced in February, 1894. The first default of the trustees in not making a report occurred on September 20, 1892. The defendants demurred on the ground that the action was barred by the provisions of section 45 of the Code of Civil Procedure of 1887, providing that an action for a penalty or forfeiture shall be commenced within one year from the time the cause accrues. The demurrer was sustained and judgment entered in favor of the defendants, and the plaintiff appealed.

Robinson & Stapleton, for the appellants.

Corbett & Wellcome, for the respondents.

⁴⁴¹ DE WITT, J. There are only two points to be decided in this case: (1) Is this an action for a penalty? If it is, the cause of action accrued as to some items on September 20, ⁴⁴² 1891, and in 1892 as to others, when the trustees failed to make their reports, and more than one year elapsed from then to the commencement of this action. This would be sufficient to dispose of the case, except that it is contended further (2) that, even if the year's limitation has run since September 20, 1891 or 1892, still it appears by the complaint that the trustees again defaulted on September 20, 1893, and therefore again started the cause of action running. These two questions will be examined.

1. Is the action one for a penalty? We have no doubt that this action is one for a penalty, as far as the application of the statute of limitations is concerned: *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Kerr on Business Corporations*; *Larsen v. James*, 1 Colo. App. 313; *Irvine v. McKeon*, 23 Cal. 472; *Chase v. Curtis*, 113 U. S. 452; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; 2 *Morawetz on Private Corporations*, sec. 907; 3 *Thompson on Corporations*, secs. 4144, 4166; 1 *Cook on Stocks and Stockholders*, sec. 223.

A statute of this nature is not universally held to be penal: *Thompson on Corporations*, sec. 4165; *Morawetz on Private Corporations*, sec. 907, et seq. But we are of opinion that, in applying the appropriate section of the statute of limitations, the action is classified as penal: *Gans v. Switzer*, 9 Mont., 413; *Elkhorn Trading Co. v. Tacoma Min. Co.*, 16 Mont. 322; *Wethey v. Kemper*, 17 Mont. 491.

Therefore, the action being for a penalty, the cause of action is barred in one year from the accruing thereof: *Code Civ. Proc.*, 1887, sec. 45. The accounts against the corporation matured at different times during the years 1891 and 1892. The trustees defaulted in making their report, required by law, both in 1891 and 1892, and, indeed, during every year. As to some of the accounts, the cause of action arose against the trustees upon their default in 1891, and upon others in 1892. This action was commenced in 1894. Therefore as to all of the accounts more than one year had run since the accruing of the liability by the trustees by reason of their default in filing the papers required by law.

⁴⁴³ 2. These views would be sufficient for the decision of the

case were it not that the appellant makes another contention. It is this: That while the liability which a trustee had incurred by reason of his default on September 20, 1892, was barred in one year—that is to say on September 20, 1893—still he defaulted again on September 20, 1893, and another period of one year's liability commenced to run. But this view is not sustained by the decided cases. The case of *Gans v. Switzer*, 9 Mont. 413, is not, in its facts in point upon this proposition. We have not been able to find that any of the text-writers sustain the position of the appellant, except that Mr. Kerr, in his work on *Business Corporations*, at page 183, makes the following remarks:

“A trustee in office at the time the corporation fails to make its annual report is liable for all the existing debts of the company, and such as may thereafter be contracted until the report is filed; and such liability attaches upon each default of the company as long as the trustee remains in office, so that, although there have been similar successive defaults of the company, and the first of which was more than three years before suit brought, but the last within three years, the action is maintainable upon the last default, and the statute of limitations is not a bar. A new and original liability is created on each default, and, if any of the defaults are within three years, such default may be made the foundation of the action. The creditor is not bound to confine himself to the first default.”

The authority of the writer for this statement is in the case of *Nimmons v. Tappan*, 2 Sweeney, 652. This case was decided in the superior court of the city of New York in 1870. Mr. Kerr's book was written in 1890, and it seems that he takes his law from a decision of a nisi prius court, when it was the fact that at that time the court of appeals of New York had held precisely the contrary: *Losee v. Bullard*, 79 N. Y. 404; *Rector etc. of Trinity Church v. Vanderbilt*, 98 N. Y. 170. In the former case, in the court of appeals, Rapallo, J., said:

“The appellants claim that the failure to file the certificate⁴⁴⁴ in each year after 1868 created a new liability on the part of the defendant, and that consequently the default in 1873 and the subsequent years can be resorted to for the purpose of maintaining this action and avoiding the effect of the statute of limitations. We think this position untenable for two reasons. In the first place the statute requires that the action be brought within three years from the time the cause of action accrued. This action was for a statutory penalty. This penalty, if it ever was in-

curred, was completely incurred in 1868, and the testator of the plaintiffs could then have brought his action therefor. We do not think that the continuance of the default in successive years had the effect of renewing the liability of the respondent, as would a new promise or a payment on account in the case of a liability founded on a contract": *Losee v. Bullard*, 79 N. Y. 406. No authority for appellant's position is presented, other than this discredited case of *Nimmons v. Tappan*, 2 Sweeney, 652.

We are of opinion that the demurrer to the complaint was properly sustained, and the judgment will therefore be affirmed

Hunt, J., concurs.

Pemberton, C. J., not sitting.

A PENALTY is in the nature of punishment for the nonperformance of an act or for the performance of an unlawful act: *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521; *Harbor Commrs. v. Redwood Co.*, 88 Cal. 491; 22 Am. St. Rep. 821. A liability imposed by statute upon a certain class of persons, as, for instance, the officers or stockholders of a corporation, which is made dependent upon the contingency of their failing to perform some duty required by the statute, is in the nature of a penalty: *Extended note to Atwell v. Huntington*, 14 Am. St. Rep. 352.

BAKER v. BARTLETT.

[18 MONTANA, 446.]

NOTICE FROM RECORD OF MORTGAGE CONTAINING AN INCORRECT DESCRIPTION.—The record of a mortgage of lot 16 in block 67 is not notice of an intention to mortgage lot 16 in block 57, though the mortgagors were the owners of that lot and not of the one described in the mortgage.

CONVEYANCES—LIS PENDENS.—The filing of a notice of lis pendens is not a conveyance, nor is the person filing it a purchaser, and, as such, protected against pre-existing unrecorded conveyances.

UNRECORDED CONVEYANCES.—LIS PENDENS AFFECTS ONLY PERSONS ACQUIRING SOME INTEREST IN THE PROPERTY AFTER THE FILING OF THE NOTICE OF THE PENDENCY OF THE SUIT. Hence, a person having a conveyance from one of the parties executed before that time is not affected, though such conveyance is not recorded and the plaintiff has no notice of it.

Suit to reform and foreclose a mortgage executed by J. H. Bartlett and wife to Thomas Leonard, and by him assigned to the plaintiff, Hannah Baker. The mortgagors made no defense, but L. H. Sinclair intervened. Bartlett, in October, 1892, was the owner of lot 16 in block 57 in the city of Anaconda, and intend-

ed to execute a mortgage thereof, but, by mistake of the scrivener, the figures 67, in stead of 57, were written in the mortgage. On October 15, 1893, the intervenor bought of Bartlett lot 16 in block 57, without any knowledge of the mortgage sued upon. Before making his purchase, he procured an examination of the record to be made for encumbrances upon lot 16 in block 57, and received a report that there were none. He paid the full purchase price of the property without having any notice of the mortgage. The present suit was brought on December 8, 1893, and a notice of its pendency was filed on the 11th of the same month, but the deed of the intervenor was not recorded until ten days later, but we infer from the opinion of the court that its execution, as well as the payment of the purchase price, antedated the commencement of this suit. The trial court decided that the plaintiff was not entitled to the reformation or foreclosure of the mortgage as against the intervenor Sinclair, and therefore rendered judgment in his favor, and the plaintiff appealed.

C. R. Middleton and O. F. Goddard, for the appellant.

James R. Gross, for the respondent.

447 DE WITT, J. Two questions are presented by this appeal. First. The plaintiff contends that the intervenor was guilty of negligence in not further examining the records for encumbrances. There is nothing meritorious in this contention, for no matter what examination had been made of the records no encumbrance would have been found upon lot 16, block 57, which was the property owned by the mortgagors. The fact that they had given the mortgage on lot 16, block 67, **448** was not notice that they intended it to be a mortgage on lot 16, block 57: *Goodrich Lumber Co. v. Davie*, 13 Mont. 76.

The other question is the one which engaged the serious attention of the district court. The intervenor, Sinclair, bought in absolute good faith, for an adequate and valuable consideration, and without actual notice of the mortgage. Therefore, the question remains: Did the purchaser, the intervenor, have constructive notice under the law? Plaintiff's action to reform and foreclose the mortgage on lot 16, block 57, was commenced and notice of *lis pendens* was filed before Sinclair recorded his deed. Therefore, does the commencement of this action affecting real estate and the filing of a notice of *lis pendens* take precedence of a deed executed prior to the filing of the notice of *lis pendens* but recorded subsequent thereto? Under our law, the commence-

ment of an action is not notice to persons who may deal with the subject of the action, but the filing of a notice of lis pendens is such notice. Our statute at the time of the transactions involved in this action was as follows:

"In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real name": Code Civ. Proc., 1887, sec. 70.

Our statute as to the conveyance of realty (Comp. Stats. 1887, div. 5), provides as to the recording thereof as follows:

449 "Section 259. Every such conveyance and instrument in writing, acknowledged or proved and certified and recorded in the manner prescribed in this chapter, from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

"Section 260. Every conveyance of real estate within this state hereafter made, which shall not be recorded as provided for in this chapter, shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

There is no question of the good faith of Sinclair involved in this case. That was settled in his favor by the findings of the court, which are not now attacked. He bought with no actual notice. Furthermore, he is not bound by any constructive notice by reason of the record of the mortgage, for the reason, as above noted, that the mortgage did not describe the premises, which are now the subject of this action. The only question left is whether the notice of lis pendens is such a notice under the recording laws that the claims of the plaintiff set up in the complaint shall take precedence of Sinclair's deed. The filing of the notice of lis pendens is a statutory matter, and the decision of

this case depends upon a construction of our statutes, above quoted. The decisions under different statutes are not in point. Looking to section 260, above quoted, and reviewing its terms seriatim, and applying them to the facts in the case at bar, we observe that the deed of Bartlett to Sinclair is, in the language of section 360, "a conveyance of real estate within the state." It was, following the language of the section further, "not recorded as provided for in this chapter." It is therefore, using the section's language again, to "be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof, where his own conveyance shall be first duly recorded." Here we meet the first ⁴⁵⁰ question for consideration. Was the plaintiff, in filing her notice of lis pendens, a subsequent purchaser? We construed these words in *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 575, in which decision we said:

"We are of opinion that the word 'purchaser,' as used in section 260, is not employed in the broad sense as indicating all acquisitions of title other than by descent. We think that the word as here used means simply a buyer in the popular sense of that term. The whole spirit of the recording laws indicates this. We think the section means a buyer of the same property from the same grantor in good faith, and for a valuable consideration, and such a buyer as records his conveyance prior to any record of conveyance to the first buyer." Therefore, we are of opinion that the plaintiff in this case, when she filed her notice of lis pendens, was not in any sense a "buyer" of lot 16, block 57. She was simply seeking to fix a lien upon it and enforce that lien.

Proceeding to the further language of section 360, the section applies to a person "where his own conveyance shall be first duly recorded." Therefore, applying this statute to the facts in the case at bar, we must, to sustain appellant's contention, call a notice of lis pendens a conveyance, and must find that it was recorded before the deed to Sinclair. It is true that the notice was recorded before the deed; but it is also true that a notice of lis pendens is not a conveyance any more than was the person filing it a purchaser. The case of *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, is wholly in accord with the view which we have expressed. In that case the court said:

"Nor could the filing of the lis pendens, as contended by counsel, operate as a prior recording of a subsequent conveyance so as to make the deed executed by the clerk to Brison relate

back to the commencement of the action, as against the deed to Harlow, which was executed before the suit was begun, and recorded before the deed made by the clerk to Brison was executed; for Brison was not a subsequent purchaser within the meaning of the statute. If he acquired title either under the decree or deed, it must have been upon other ⁴⁵¹ grounds. Nor was the *lis pendens* such an 'instrument' as the statute contemplates. The word 'conveyance,' as used in sections 1213 and 1214, of the Civil Code, is defined by section 1215, and the word 'instrument,' as used in the recording acts, was construed in *Hoag v. Howard*, 55 Cal. 564, where it was held to mean 'some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty,' and that it did not include a writ of attachment."

In *Jones on Real Property and Conveyancing*, volume 2, a work published this year, the following remarks are made as to notice of *lis pendens*, in section 1559: "The doctrine of *lis pendens*, however, is not carried to the extent of making it constructive notice of a prior unregistered deed; as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of the mortgaged property."

A rule thus applied to an unrecorded mortgage would equally apply to a mortgage which does not describe the land intended, and which therefore was not notice to a purchaser. Upon the same subject we find the same author remarking as follows: "*Lis pendens* is a harsh rule in all cases, and especially so under our statute, which does not require a filing or recording in the office of the register of deeds, and a court will not extend its provisions beyond that absolutely required by the strict necessities of the case. It has never been applied, so far as our investigation goes, except where property, generally real estate, has been in actual litigation and the pleadings disclose the identical property which is the subject thereof": *Seibel v. Bath* (Wyo., June 25, 1895), 40 Pac. Rep. 756. "Only those persons are charged with notice, or are affected by a *lis pendens*, who, pending the suit, purchase from a party to the suit, or derive title from one so purchasing."

We also quote the following from *Wade on Notice*, section 360: ⁴⁵² "This doctrine, being originally invoked by courts of equity, rather as a measure of necessity, to prevent a failure of justice, than on account of its consistency with abstract justice, and be-

ing employed to restrain mere strangers from coming in pendente lite, by acquiring an interest in the subject of litigation, the courts have uniformly refused to extend its provisions to others who were not purchasers in the strict sense of the term. It will, therefore, not affect either mortgagees, whose securities are prior to the suit, or to the holders of antecedently acquired interests in the property."

Among many authorities in point the respondent refers us to the following: *Hammond v. Paxton*, 58 Mich. 893; *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656; *Freeman on Judgments*, secs. 191-201, and cases; *Wade on Notice*, 337, et seq; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236; *Parker v. Conner*, 45 Am. Rep. 187, note; *McIlwrath v. Hollander*, 39 Am. Rep. 486, note. In the two cases last referred to in the American Reports, there are very complete and satisfactory notes upon this subject.

The result of our inquiry is, that we are of opinion that the conclusions of law by the district court are fully sustained by the findings of fact and the admissions of the pleadings. The evidence is not brought up and no question is made as to the findings being sustained by the evidence.

Judgment is therefore sustained.

Hunt, J., concurs.

Pemberton, C. J., not sitting.

MORTGAGES—RECORD OF AS NOTICE—MISTAKE.—A mere mistake in the record of a mortgage as to the number of acres covered by it, when the number of acres stated in the mortgage is accompanied by the words "more or less," will not restrict the lien of the mortgagee to the number of acres stated in the record: *Kennedy v. Borkin*, 35 S. C. 61; 28 Am. St. Rep. 838.

LIS PENDENS.—THE HOLDER OF AN UNRECORDED DEED cannot be affected by a judgment in a suit brought by his grantor after the execution of the deed, though the notice of the pendency of the suit is filed and recorded before such deed: *Warnock v. Harlow*, 96 Cal. 298; 31 Am. St. Rep. 209.

LIS PENDENS does not affect persons whose rights existed before the suit commenced: *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656, and note. See, also, the notes to *Norris v. Ile*, 43 Am. St. Rep. 246, and *Newman v. Chapman*, 14 Am. Dec. 776.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

MANCHESTER & GUARDIAN ASSURANCE COMPANY.
[151 NEW YORK, 83.]

INSURANCE—WAIVER OF WRITTEN INDORSEMENT OF CHANGE IN OWNERSHIP.—If a conveyance is made of insured property, and notice thereof given to a general agent of the insurer, who thereupon agrees to make on the policy the indorsement necessary to give the grantee the benefit of the insurance, but fails to comply with his agreement, and the property is subsequently destroyed by the peril insured against, the insurer is liable to an action to recover the damages resulting to the purchaser from the failure to make such indorsement.

INSURANCE—ESTOPPEL.—If a purchaser of insured property is by the oral agreement of a general agent of the insurer to indorse on the policy the consent to the transfer to such purchaser, and he is thereby prevented from effecting other insurance thereon, the insurer is precluded from claiming a forfeiture of the policy on the ground of the absence of such indorsement, and also from insisting that there was no consideration for the agreement to make the indorsement.

Charles E. Patterson, for the appellants.

A. H. Sawyer, for the respondent.

80 **MARTIN, J.** Prior to and upon the eighth day of January, 1889, Ebenezer S. Strait owned certain premises situated in the county of Rensselaer. On that day he procured from the defendant, through its general agent at Troy, a policy of insurance upon the buildings on the premises insuring him against loss or damage by fire to the extent of two thousand dollars. It was a New York standard fire insurance policy.

At that time there were several mortgages upon the property held by the Troy Savings Bank amounting to sixteen thousand

dollars, and this policy, with others, was held by the bank as collateral, and it was in its possession.

⁹¹ On August 1, 1890, Strait conveyed the property insured to Emily J. Manchester, who took immediate possession. The insurance by the defendant was also transferred to her. Shortly after these transfers Strait, as her agent, notified the general agents of the defendant thereof and requested them to go to the bank where the policy was and make the necessary indorsement upon it, which they agreed to do. This agreement, however, they failed to perform.

In the following September a fire occurred, by which the property was destroyed. The plaintiff, George N. Manchester, subsequently procured assignments of the outstanding mortgages to himself, and thus acquired the same rights as were possessed by the bank. Proofs of loss were duly furnished to the defendant. It is conceded that if the plaintiffs are entitled to recover they are entitled to the sum of two thousand one hundred and fifteen dollars and fourteen cents.

On the trial the plaintiffs were nonsuited, presumably upon the grounds that there was a change of title to the property without any written indorsement upon the policy consenting thereto, and that the agents had no power to waive any of its provisions.

The most important and practically the only question in this case is, whether upon those facts the plaintiffs were entitled to recover. The defendant, through its general agents, had notice of the change of ownership, and agreed to indorse upon the policy the defendant's consent to the transfer from Strait to Mrs. Manchester. The policy was within the defendant's reach for that purpose. This agreement it failed to perform. The plaintiffs now seek to recover as damages for a breach of that agreement the loss they have sustained. The defendant endeavors to relieve itself from liability because no consent was actually indorsed upon the policy. In other words, it undertakes to defeat the plaintiffs' action upon the ground of the nonperformance of an act which it expressly agreed itself to perform.

We think this case falls within the principle of *Ellis v. Albany City etc. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495; *Angell v. Hartford etc. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322; *Ruggles v. American Cent. Ins. Co.*, ⁹² 114 N. Y. 415; 11 Am. St. Rep. 674, and other kindred cases. In those cases this court held that an agent of a fire insurance company, who was authorized to negotiate contracts of insurance and to fill up and deliver policies

executed in blank left with him for that purpose, had authority to make a parol preliminary contract to issue a policy, and that the recovery of the amount agreed to be insured was the proper measure of damages for the breach of such a contract.

As the defendant's agents had unrestricted authority to make the indorsement necessary to continue the policy in force, it would seem that they also had authority to make a preliminary contract therefor. Such a contract was made, and was based upon a sufficient consideration. Under the doctrine of the cases cited, it is obvious that the plaintiffs were entitled to recover for a breach of the contract made with the defendant for a continuance of its policy and to recover as damages the amount of such insurance.

Moreover, it is quite probable that the plaintiffs were prevented from procuring other insurance by reason of their reliance upon the agreement of the defendant to make the proper indorsement upon the policy necessary to continue it in force. It would be the natural result of the defendant's act, and, consequently, the case falls within the principle upon which the doctrine of equitable estoppel is founded, and the defendant should be precluded from claiming a forfeiture of the policy on the ground of the absence of such an indorsement or from insisting that there was a want of consideration: *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 304; *Whited v. Germania etc. Ins. Co.*, 76 N. Y. 415; 32 Am. Rep. 330; *Buchanan v. Exchange etc. Ins. Co.*, 61 N. Y. 26; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

The learned general term based its decision principally upon the case of *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547, 552. We think that case is clearly distinguishable from the case at bar. There the question arose over the provision that, unless otherwise provided by agreement indorsed upon the policy, it should be void in case ⁹⁸ of other insurance. After the policy was issued the plaintiff procured other insurance, and afterward saw the defendant's agent upon the street talking with another man, when he walked up to him and said that he had other insurance for one thousand dollars, to which the agent replied: "All right, I will attend to it." Upon these facts it was held that such a notice did not satisfy the requirements of the policy or estop the defendant from insisting upon its forfeiture. In discussing the question in that case it was, however, said: "At most, the language of the agent amounted to nothing more than his personal promise to do something in the future, and neither

he nor the company could be held to be in default, with respect to such promise, until the plaintiff had presented the policy to him and requested him to make the indorsement. In case of a refusal then to do what he had promised to do, it may be that the plaintiff's reliance upon the promise and any changed condition of the parties with respect to the new insurance, in consequence, would be sufficient to induce a court of equity to compel performance." In this case there was an express promise to make the indorsement required, and there was nothing to be done by the plaintiffs before the defendant was to act. The policy was in the hands of a third person and not under the plaintiff's control. With a full knowledge of that fact, the defendant promised to go where the policy was kept and make the required indorsement. Therefore, this case is clearly within the exceptions suggested in the opinion in *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547, 552. We find nothing in that case which is in conflict with the conclusion we have reached in this.

The judgment of the general and trial terms should be reversed and a new trial granted, with costs to abide the event.

All concur.

INSURANCE—FIRE—WAIVER OF FORFEITURE.—Where a policy of fire insurance is forfeited by a change in the title of the insured property, and the agent of the insurers informs the person for whose benefit the policy was issued that it will be allowed to stand, the insurers cannot, after a loss by fire, elect to declare the policy void: *Pratt v. New York etc. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 804. Where defendant's agent agreed orally with plaintiff to insure his building and deliver a policy, the premium to be paid on delivery, but failed to do so, and defendant's building was destroyed by fire, and he afterward tendered the premium, it was held, that the contract of insurance was valid, and that defendant was liable for the amount of the proposed insurance: *Angell v. Hartford etc. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 822.

MITCHELL v. ROCHESTER RAILWAY COMPANY.

[151 NEW YORK, 107.]

DAMAGES FROM FRIGHT.—If there is no immediate personal injury to a plaintiff from the negligence of another, she cannot recover for injury occasioned by her fright arising from the negligent act, though in consequence of the fright she became unconscious, and had a miscarriage.

DAMAGES.—**PROXIMATE DAMAGES FOR NEGLIGENCE** are such as are the ordinary and natural result thereof. Hence they do not include the mere frightening of a person and peculiar injuries, resulting from such fright, as where it occasioned a miscarriage.

Charles J. Bissell, for the appellant.

Norris Bull, for the respondent.

¹⁰⁸ **MARTIN, J.** The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse-car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the ¹⁰⁹ approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury: *Lehman v. Brooklyn City R. R. Co.*, 47 Hun, 355; *Victorian Ry. Commrs. v. Coultas*, L. R. 18 App. Cas. 222; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40; 80 Am. St. Rep. 709. The learned counsel for the respondent in

his brief very properly stated that, "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Texas etc. Ry. Co.*, 60 Fed. Rep. 557; *Joch v. Dankwardt*, 85 Ill. 831; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471; *Renner v. Canfield*, 36 Minn. 90; 1 Am. St. Rep. 654; *Allsop v. Allsop*, 5 Hurl. & N., N. S., 534; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; 3 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303.

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in ¹¹⁰ no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and

may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the general and special terms should be ¹¹¹ reversed, and the order of the trial term granting a nonsuit affirmed, with costs.

All concur, except Haight, J., not sitting, and Vann, J., not voting.

Ordered accordingly.

DAMAGES FOR FRIGHT.—Mere fright or mental agony caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, although it produces permanent injury to the nervous system: *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40; 80 Am. St. Rep. 709, and note; *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 402; 40 Am. St. Rep. 866, and note.

DAMAGES—PROXIMATE.—The damages recoverable for a tort include all injuries resulting from the wrongful act, whether they could have been foreseen by the wrongdoer or not: *Vosburg v. Putney*, 80 Wis. 523; 27 Am. St. Rep. 47. Damages are compensation for actual injury in actions ex delicto, and must be the natural and proximate consequences of the act complained of: *Worcester v. Great Falls Mfg. Co.*, 41 Me. 159; 66 Am. Dec. 217, and note; *Seeley v. Alden*, 61 Pa. St. 302; 100 Am. Dec. 642; *Harrison v. Berkley*, 1 Stroh. 525; 47 Am. Dec. 578. See, especially, the note to *McDonald v. Snelling*, 92 Am. Dec. 776, 777.

REICH v. COCHRAN.

[151 NEW YORK, 122.]

RES JUDICATA.—A JUDGMENT IN FAVOR OF A LANDLORD AGAINST A TENANT, though by default, for the recovery of the possession of the premises, on the ground that there was a certain amount of rent due and unpaid, followed by the payment by defendant of such sum, is conclusive against him that there was a valid lease to him from the plaintiff of the premises described in the complaint, and estops the defendant from maintaining an action to have it adjudged that the lease to him was in fact intended as a mortgage, and was usurious, and that it should be delivered up and canceled upon the ground of such usury.

A JUDGMENT BY DEFAULT IN SUMMARY PROCEEDINGS BY A LANDLORD for the nonpayment of rent is conclusive between the parties of the existence and validity of the lease, the occupation by the tenant, that the rent was due, and also of every other fact stated in the complaint, and required to be alleged as a basis of the proceedings.

APPELLATE PROCEDURE.—A QUESTION NOT RAISED AT THE TRIAL will not be considered for the first time on appeal.

Delos McCurdy, for the appellant.

Treadwell Cleveland, for the respondent.

¹²⁴ MARTIN, J. On the twenty-fourth day of February, 1886, the trustees under the will of William B. Astor leased to the ¹²⁵ plaintiff premises in the city of New York known as the Cambridge Hotel. Afterward, and on or about the first day of May, 1887, the defendant loaned to the plaintiff several large amounts of money, to secure the payment of which the plaintiff gave him his bonds and executed to him mortgages upon such lease. On the first day of February, 1888, the plaintiff assigned the Astor lease to the defendant, and thereupon the defendant made and executed a sublease of the premises to the plaintiff.

The purpose of this action was to procure an adjudication to the effect that the lease from the defendant to the plaintiff was in fact intended as a mortgage, that it was usurious, and that the assignment by the plaintiff to the defendant, and the lease from the defendant to the plaintiff should be delivered up and canceled upon the ground of such usury.

On August 1, 1893, the sum of thirteen thousand two hundred and fifty dollars rent became due to the defendant according to the terms of the lease between the parties, which was not paid. The defendant subsequently commenced summary proceedings in the district court of the city of New York in the district in which the premises are situated to dispossess the plaintiff for nonpayment of rent. Upon the return day of the precept the plaintiff

herein appeared by attorney. No answer was interposed, and this defendant had judgment, and a warrant issued, but was stayed until the following day, when the plaintiff paid the amount of the judgment.

The defendant subsequently served a supplemental answer in this action, setting up the foregoing proceedings and judgment as a defense herein. On the trial a certified copy thereof was introduced in evidence, and a motion was made on the pleadings to dismiss the complaint, when the following stipulation was made in open court: "For the purposes of this motion it is conceded that, in August last, a proceeding was instituted in the sixth judicial district court in the city of New York, whereby this defendant sought to dispossess the plaintiff, on the ground that there was a certain amount of rent due under the lease that is set up in the complaint, and ¹²⁶ that such proceedings were had on the 17th of August, 1892, [that] a judgment was entered in favor of the petitioner that said petitioner have possession of the premises therein described by reason of the nonpayment of the tenant's rent, and that a warrant issue to remove the said tenant and all persons from the said premises, and to put the petitioner in full possession thereof; that, subsequently, this plaintiff paid the amount stated in the petition as claimed to be due for rent." After the stipulation the motion to dismiss the complaint was granted on the ground that the judgment in the summary proceedings was an adjudication that the relation of landlord and tenant existed between the parties, and that there was a valid lease of the premises described in the complaint from the defendant to the plaintiff, and that, therefore, the plaintiff was estopped thereby from questioning the existence of that relation or the existence of a valid lease.

The correctness of that ruling is challenged by the appellant, and presents the only question involving the merits of this controversy. An examination of the allegations of the petition and the stipulation of the parties made on the trial renders it obvious that the judgment entered in favor of the defendant in the New York district court for the removal of the plaintiff as tenant involved a direct adjudication between the parties that they occupied the relation of landlord and tenant, and that the lease from the defendant to the plaintiff was valid.

A judgment taken by default in summary proceedings by a landlord for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation by

the tenant, and that rent is due, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings: *Brown v. Mayor*, 66 N. Y. 385; *Jarvis v. Driggs*, 69 N. Y. 143; *Nemetty v. Naylor*, 100 N. Y. 562. To authorize a judgment to remove a tenant holding over, the conventional relation of landlord and tenant must exist, and, in such a proceeding, the tenant, under a denial of the facts upon which the ¹²⁷ summons is issued, may prove that the alleged lease was executed in pursuance of an usurious agreement and is void, so that such relation does not exist: *People v. Howlett*, 76 N. Y. 574.

The principle of the authorities cited seems decisive of the question under consideration. To establish the relation of landlord and tenant between the parties, and to entitle the defendant to a judgment in the summary proceedings, the existence of a valid lease upon which rent was due from the plaintiff to the defendant was necessary. The existence of such a lease was alleged in the petition and not denied. No cause was shown before the district court why possession of the property should not be delivered to the petitioner. The plaintiff neither alleged nor attempted to prove that the lease was usurious, or invalid for any other reason. The questions whether the lease was intended as a mortgage, and, if so, whether it was based upon an usurious contract, could have been tried in the proceedings in the district court. The determination in that proceeding comprehended and involved every question relating to the validity of the lease and the relation between the parties, and the estoppel of the judgment extends to them even though they were not litigated or considered in that proceeding: *Gates v. Preston*, 41 N. Y. 113; *Collins v. Bennett*, 46 N. Y. 490; *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455; *Dunham v. Bower*, 77 N. Y. 76; 33 Am. Rep. 570; *Jordan v. Van Epps*, 85 N. Y. 427; *Griffin v. Long Island R. Co.*, 102 N. Y. 449; *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470.

The rule as stated by Andrews, J., in *Pray v. Hegeman*, 98 N. Y. 351, must be regarded as the general rule in this state governing the question of estoppel by judgment. In that case it was said: "The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are com-

prehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary ¹²⁸ to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided." This rule has been fully indorsed by subsequent decisions of this court, as will be seen by examination of the cases of *Griffin v. Long Island R. R. Co.*, 102 N. Y. 452; *Campbell etc. Co. v. Walker*, 114 N. Y. 12; *O'Rourke v. Hadcock*, 114 N. Y. 553; *Hymes v. Estey*, 116 N. Y. 509, 15 Am. St. Rep. 421, and *Thompson v. Sanders*, 118 N. Y. 257. It is on the principle that a judgment is a bar to a right of recovery where a party has had his day in court, with full opportunity to be heard and to assert and protect his rights, although he failed to do so, that it has been held that a former judgment for the services of a physician is a bar to an action against him for malpractice: *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455; that a judgment for the board of a horse is a bar to an action for his conversion: *Collins v. Bennett*, 46 N. Y. 490; that a judgment by a carrier for freight is *res judicata* in an action for the destruction of the property caused by a failure of the carrier to perform his contract: *Dunham v. Bowers*, 77 N. Y. 76; 33 Am. Rep. 570; that a judgment in partition, to which the plaintiff was a party, is a bar to a recovery in an action by her for dower: *Jordan v. Van Epps*, 85 N. Y. 427; that a judgment in an action by a plaintiff as receiver for trespass upon the property of a corporation is conclusive against the defendant's claim in a subsequent action that the plaintiff's appointment was invalid: *Griffin v. Long Island R. R. Co.*, 102 N. Y. 449; and that where in a former action there was a judgment to the effect that the plaintiff's cause of action upon contract was divisible, it is *res judicata* in a second action for a subsequent default: *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470.

While the attorney for the appellant has presented an exhaustive brief and argument upon this subject, has made an extensive review of the authorities, attempting to distinguish the principle established by them from that involved in this case, yet, after carefully examining the cases to which he refers ¹²⁹ and duly considering his ingenious argument upon the question, we are still of the opinion that the decisions of this court are ad-

verse to his contention, and that the learned general term properly held that the judgment of the district court was conclusive upon the parties and a bar to this action.

The appellant, in his brief, has also raised several questions as to the regularity of the proceedings and the validity of the judgment entered in the district court. We do not deem it necessary to examine them separately. The record discloses that the plaintiff in this action appeared in the district court and made no objections to the regularity of the proceedings therein. Furthermore, upon the trial of this action, it was stipulated in open court that such a proceeding was instituted for the purpose of dispossessing the plaintiff, and that on the seventeenth of August, 1892, a judgment was entered in favor of the petitioner that he have possession of the premises and that a warrant issue to remove him therefrom. There was then no claim or suggestion that any of the proceedings which resulted in that judgment were irregular or that the judgment was invalid. We think, when properly construed, this stipulation must be regarded as an admission that a proper and valid judgment was entered in favor of the petitioner. Under the circumstances, we are of the opinion that the plaintiff is not in a position to raise any question as to the regularity or validity of that judgment.

Moreover, no such objections were taken to the judgment upon the trial of this action, and it is a well-settled rule in this court that a question which was not raised on the trial will not be considered for the first time on appeal: *Oatman v. Taylor*, 29 N. Y. 649, 662; *Sterrett v. Third Nat. Bank*, 122 N. Y. 659; *Blair v. Flack*, 141 N. Y. 53, 56; *Oliphant v. Burns*, 146 N. Y. 218, 236; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 614; 15 Am. St. Rep. 447.

We think the judgment of the general term was right and should be affirmed, with costs.

All concur.

JUDGMENT BY DEFAULT—CONCLUSIVENESS OF.—A judgment by default, after service of summons and complaint and failure to answer, admits the truth of every material allegation in the complaint: *Philbrick v. O'Connor*, 15 Or. 15; 3 Am. St. Rep. 139, and note. See, also, the note to *Dunlap v. Steere*, 27 Am. St. Rep. 148.

APPEAL.—An objection not made or a question not raised in the trial court will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465; *Fleming v. Fleming*, 33 S. C. 505; 26 Am. St. Rep. 694; *Woods v. Bryan*, 41 N. C. 74; 44 Am. St. Rep. 688.

TILLINGHAST v. MERRILL.

(181 NEW YORK, 185.)

**PUBLIC OFFICERS, LIABILITY OF FOR PUBLIC MON-
EYS.**—A supervisor or other public officer acting in good faith and without negligence is responsible for the loss of moneys which come to his official custody, and therefore is answerable for moneys deposited with a firm of private bankers to his credit as such officer, upon such moneys being subsequently lost by the failure of the bankers, though in making the deposit he acted in good faith and without negligence.

Henry B. Coman, for the appellants.

John E. Smith and Joseph Mason, for the respondent.

¹²⁸ **BARTLETT, J.** The defendant Merrill, while supervisor of the town of Stockbridge, in the county of Madison, deposited with a firm of private bankers to his credit, as supervisor, certain of the public moneys in his hands; the banking firm afterward failed and the money was totally lost. This action was brought by the county treasurer to recover the money of Merrill and his bondsmen, upon the theory that Merrill, on receiving the money, became the debtor of the county, and that the deposit of the same was at his own risk. The trial judge found that Merrill acted in good faith and without negligence in all that he did in the premises.

Under these circumstances, the learned counsel for the defendants has urged, with much earnestness and ability, that a supervisor rests under the common-law liability whereby he was bound to exercise good faith and reasonable diligence in the discharge of his duties, and is not responsible for any loss of money which came to his official custody, occurring without ¹²⁹ fault on his part; that proof of the failure of the banking firm, where he had deposited the money in good faith and without negligence, is a complete defense to this action.

The trial judge and general term have found against the defendants, and it remains for this court to determine which measure of liability is to be applied to a supervisor under the circumstances stated.

The question is an open one in this state, and as the case at bar presents a claim against a supervisor who acted in good faith and without negligence, we are permitted to consider and decide this appeal upon general principles and in the light of public policy. It is rather remarkable that in a great business state like New York this question should not have been decided long since by the court of last resort.

In 1841 the case of *Supervisors v. Dorr*, 25 Wend. 440, came before the supreme court, composed of Nelson, C. J., and Justices Bronson and Cowen. Dorr was county treasurer, and had given a bond to faithfully execute the duties of his office and pay according to law all moneys. The declaration was on the bond, alleging breaches in not paying over and in not accounting. Dorr pleaded that the identical money received by him was stolen from his office without negligence on his part. To this plea the plaintiff demurred.

Chief Justice Nelson, delivering the opinion of the court, stated that the question was "whether an officer concerned in the receipt and disbursement of the public funds is an insurer of the same, *ex virtute officii*, whilst they necessarily remain in his custody."

He then stated that "the principle was decided in favor of the defendant in *Lane v. Cotton*, 1 *Ld. Raym.* 646, and subsequently confirmed in *Whitfield v. Le Despencer*, *Cowp.* 754, and is in conformity with the general rule of daily application that in order to subject the officer it is necessary to prove misconduct or neglect in the execution of his duties." Justices Bronson and Cowen concurred.

¹⁴⁰ An appeal was taken to the court of errors, and that court equally divided upon the question, the effect of which was to affirm the judgment below, and the case stands with no more force as a precedent than a unanimous opinion of the supreme court.

Chancellor Walworth, in the court of errors, wrote for affirmance, thus adding his name to those of the distinguished justices of the supreme court, who had decided to limit the liability of a public officer by the rule of the common law.

It has been a mooted question whether this case was overruled by *Muzzy v. Shattuck*, 1 *Denio*, 233, decided in 1845. Mr. Hill, in his note to *Supervisors v. Dorr*, 25 Wend. 440, in court of errors (7 Hill, 584), says that in *Muzzy v. Shattuck*, 1 *Denio*, 233, the law seems to have been settled, and properly, directly the other way.

On the other hand, Judge Earl, in *People v. Faulkner*, 107 N. Y. 486, in referring to *Supervisors v. Dorr*, 25 Wend. 440, says: "The doctrine of that case has been erroneously supposed to have been overruled by the decision in *Muzzy v. Shattuck*, 1 *Denio*, 233. In the latter case, the action was upon the official bond of a town collector, and the defense was, that the money was stolen

from him. It was held that the defense was not good, the supreme court then being composed of Bronson, C. J., and Justices Beardsley and Jewett; and Bronson, who concurred in the prior decision, also concurred in this without any indication that he had changed his views. The prior decision was referred to in the opinion of the court, but not criticised or disapproved. This decision was based, not upon the common law, and not upon the force and effect of the official bond given by the collector, but upon the statutes defining the duties and liabilities of the collector; and the court held that by those statutes he was made an absolute debtor for the money collected by him, and that the fact that the money was stolen, therefore, constituted no defense." The learned judge, after a further elaboration of his views as to *Supervisors v. Dorr*, 25 Wend. 440, reaches the conclusion that, in view of the decisions of the federal and state courts, the case should probably ¹⁴¹ not be regarded as binding authority in this state, and that the question therein decided is an open one; he also held that it was not necessary to decide the question in the case in which he was writing, as the money received by the defendant surrogate was not public money, but belonged to a private estate or to individuals.

It, therefore, comes to this, that for forty-five years the case of *Supervisors v. Dorr*, 25 Wend. 440, has stood without being directly overruled by any case in this state, and the rule of the limited liability of the common law approved therein by four of our most distinguished judges.

It must be admitted, however, that the weight of authority in the federal and state courts is in favor of holding officials having the custody of public moneys liable for its loss, although accruing without their fault or negligence. In many of these cases, the decision turned upon the construction of the local statute or the official bond, but others squarely decide the question on principles of public policy.

In the case at bar, the defendant Merrill is sought to be held liable for school moneys paid to him by the county treasurer to disburse in payment of the salaries of school teachers upon the orders of the trustees. The statute imposing this duty reads as follows, viz: "It is the duty of every supervisor: 1. To disburse the school moneys in his hands applicable to the payment of teachers' wages upon and only upon the written orders of a sole trustee, or a majority of the trustees, in favor of qualified teachers": 2 Rev. Stats., 8th ed., sec. 6., p. 1283. By paragraph 8 of

the same section a supervisor is required to pay to his successor all school moneys remaining in his hands.

In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse, and justly account for the same does not add to the liability created by statute.

¹⁴² As before intimated, we must consider and decide this question upon general principles and in the light of public policy.

In the case of an officer disbursing the public moneys, much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case, it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law, which exacted proof of misconduct or neglect.

It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

Without regard to decisions outside of our own jurisdiction we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States supreme court, in *United States v. Thomas*, 15 Wall. 337, held the surveyor of customs for the port of Nashville, Tennessee, and depositary of public money at that place, not liable when prevented from responding by the act of God or the public enemy.

If that state of facts is hereafter presented to this court, it will doubtless be carefully considered whether it does not present a proper exception to the general rule.

¹⁴³ It would not be profitable to refer in detail to the many

cases, federal and state, which sustain the strict rule of liability, and we content ourselves with a reference to a number of them involving losses by robbery, burglary, bank failure, and the like: *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*, 9 Wall. 83; *Boyden v. United States*, 13 Wall. 17; *Bevans v. United States*, 13 Wall. 56; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112; 59 Am. Dec. 171; *Commonwealth v. Comly*, 3 Pa. St. 372; *Inhabitants of New Providence v. McEachron*, 33 N. J. L. 339; *State v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *Lowry v. Polk County*, 51 Iowa, 50; 33 Am. Rep. 114; *Perley v. County of Muskegon*, 32 Mich. 132; 20 Am. Rep. 637; *Nason v. Directors of the Poor*, 126 Pa. St. 445; *Supervisors of Omro v. Kaime*, 39 Wis. 468; *Redwood County v. Tower*, 28 Minn. 45; *State v. Harper*, 6 Ohio St. 607; 67 Am. Dec. 363; *Halbert v. State*, 22 Ind. 125; *Ward v. School District*, 10 Neb. 293; 35 Am. Rep. 477.

The views we have expressed lead to a final judgment against the defendant Merrill as supervisor of the town of Stockbridge, although he is shown by this record to have discharged his official duties in an honorable and faithful manner.

The judgment appealed from should be affirmed, with costs.

All concur, except Gray, J., dissenting, and Martin, J., not sitting.

OFFICERS—LIABILITY FOR PUBLIC MONEYS.—A public officer intrusted with public funds is not an insurer against their loss and is responsible only for the exercise of good faith, diligence, prudence, and caution for their safe-keeping: *State v. Copeland*, 26 Tenn. 296; 54 Am. St. Rep. 840, and note.

ADAMS v. NEW JERSEY STEAMBOAT COMPANY.

[151 NEW YORK, 163.]

CARRIERS OF PASSENGERS, LIABILITY OF FOR THEFTS OF MONEYS.—A steamboat company is liable to a passenger who has procured a stateroom for his comfort during his journey for moneys, reasonable in amount, considering such journey, lost from such room by theft, without negligence on the part either of the passenger or of the company. The relations between such a company and its passengers differ in no essential respect from those existing between an innkeeper and his guests.

W. D. Prentice, for the appellant.

Westmoreland D. Davis, for the respondent.

¹⁶⁵ O'BRIEN, J. On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany ¹⁶⁶ on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of one hundred and sixty dollars in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached it through the window of the room.

The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is in law liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which inn-keepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties: Story on Bailments, sec. 464; 2 Kent's Commentaries, 592; Hulett v. Swift, 33 N. Y. 571; 88 Am. Dec. 405. The relations that exist between a steamboat company and its passengers, ¹⁶⁷ who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the inn-keeper and his guests.

The passenger procures and pays for his room for the same

reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff unless the loss was caused by the act of God or the public enemies, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage: *Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292; *Elliott v. Rossell*, 10 Johns. 7; 6 Am. Dec. 306; *Brown on Carriers*, sec. 41; *Redfield on Carriers*, sec. 24; *Angell on Carriers*, sec. 80.

Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money under the circumstances than for the loss of what might be strictly called baggage.

The question involved in this case was very fully and ably discussed in the case of *Crozier v. Boston etc. Steamboat Co.*, 43 How. Pr. 466, and in *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr., N. S., 229. The liability of the carrier in such cases as an insurer seems to have ¹⁶⁸ been very clearly demonstrated in the opinion of the court in both actions upon reason, public policy, and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53; 21 Am. St. Rep. 644, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control

the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping-car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers, have not been extended to this new relation.

This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation and liability for loss of baggage is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping-car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping-cars is held to a high degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are ¹⁶⁹ stated quite fully in the adjudged cases and that do not apply in the case at bar: *Ulrich v. New York etc. R. R. Co.*, 108 N. Y. 80; 2 Am. St. Rep. 369; *Pullman etc. Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Woodruff etc. Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; *Lewis v. New York etc. Co.*, 143 Mass. 267; 58 Am. Rep. 135.

But, aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former, the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common law rule of responsibility. The

use of sleeping-cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping-car or in a drawingroom-car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect, and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held ¹⁷⁰ liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract before the question of responsibility can arise, whether the passenger be in one of the sleeping berths or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest, and it would, perhaps, be unjust to so extend the liability when the nature and character of the duties which it assumes are considered.

But the traveler who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navi-

gate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotelkeeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff without any proof of negligence.

The judgment should be affirmed.

All concur.

CARRIERS OF PASSENGERS—LIABILITY FOR THEFTS OF MONEYS.—The master and owners of a steamboat are not liable for the theft of a package of money brought on board by a passenger and retained by him within his personal custody, no compensation for the carriage of the package being paid: *Wilcox v. Steamboat Philadelphia*, 9 La. 80; 29 Am. Dec. 436, and note. The owner of a steamship carrying passengers for hire is not an innkeeper, although the passenger pays a round sum for transportation, board and lodging: *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456. Sleeping-car corporations are not answerable as innkeepers for the loss or theft of articles from their cars: *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53; 42 Am. St. Rep. 902. See, also, the extended note to *Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 832.

FOLEY v. ROYAL ARCANUM.

[151 NEW YORK, 196.]

INSURANCE, LIFE—STATEMENTS, TRUTH OF, WHEN GUARANTEED.—If, in an application for life insurance, the applicant purports to warrant the truthfulness of statements therein, and a certificate issued to him purports to be upon condition that the statements made in such application are a part of the contract, such statements become a part of such contract, and, if knowingly false, avoid it.

INSURANCE—WAIVER BY APPLICANT OF HIS PRIVILEGE TO HAVE HIS PHYSICIAN NOT TESTIFY.—If in an application for life insurance, the applicant declares that he waives any and all provisions of law preventing any physician from disclosing any information acquired while attending the applicant in a professional capacity, or rendering him incompetent as a witness, and consents that such physician may testify concerning the applicant's health and physical condition, past, present, or future, such waiver is valid, and entitles the insurer in an action upon a policy issued upon such application to call and examine a physician as a witness and to have him answer a question which, but for such waiver, must be regarded as a privileged communication which he was not at liberty to disclose.

PUBLIC POLICY.—A WAIVER OF THE RIGHT TO HAVE INFORMATION ACQUIRED BY A PHYSICIAN while attending his patient regarded as a privileged communication, not to be disclosed in evidence without the consent of the patient, is not against public policy when made in an application for life insurance, and is therefore valid, and may be enforced after the death of the patient against any person claiming under the contract of which the waiver was part.

John M. Gardner, for the appellant.

S. M. Lindsley, for the respondent.

199 HAIGHT, J. This action was brought to recover the amount alleged to be due upon a benefit certificate.

The defendant is a fraternal beneficiary society and as such issued to Jeremiah B. Foley a benefit certificate for three thousand dollars, payable upon his death to his widow. The certificate was issued on the 5th day of April, 1890, and Foley died on the fourteenth day of July thereafter, leaving the plaintiff, his widow, him surviving. The defense interposed was misrepresentations as to his physical condition and breach of warranties with reference thereto.

The representations complained of were to the effect that he had no hemorrhoids or diseases of the genital or urinary organs. The evidence taken at the trial tended to show that he was afflicted with these diseases; that he had consulted physicians with reference thereto, and had been advised to go to the hospital and submit to an operation prior to his making ²⁰⁰ his application for insurance herein; that shortly after his application was allowed and the certificate issued to him, he went to a hospital in the city of New York and submitted to an operation, and that he shortly thereafter died in the hospital. The evidence with reference to his physical condition was without substantial dispute, and, upon the theory that his statements were warranties, no question of fact was presented which it was necessary to submit to the jury.

The application was in writing signed by Foley, and, among other things, contained the following: "I do hereby warrant the truthfulness of the statements in this application, and consent and agree that any untrue or fraudulent statement made herein or to the medical examiner, or any concealment of facts by me in this application . . . shall forfeit the rights of myself and my family or dependents to all benefits and privileges therein." And further, "I hereby expressly waive any and all provisions of law now existing or that may hereafter exist preventing

any physician from disclosing any information acquired in attending me in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and I hereby consent and request that any such physician testifying concerning my health and physical condition, past, present, or future." The benefit certificate issued to him, among other things, provided that it was issued "upon condition that the statements made by him in his application for membership in said council and the statements certified by him to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract."

It is now urged that the "statements" referred to in the certificate do not include the warranty or waiver embraced in the application, and that such warranty and waiver became no part of the contract. This view, we think, should not be adopted. From the reading of the certificate, application, and medical examination, which is also signed by Foley, it is quite apparent that it was the understanding and intention of the contracting parties that the application was to become a part of the contract. We do not overlook the rule that, in construing ²⁰¹ contracts of insurance, we should be strict as to the insurer and liberal as to the insured. It does not in this case permit an escape from the manifest intention of the parties. To limit the word "statements" appearing in the certificate to that which he has stated in the application with reference to his physical condition, excluding all other assertions, we think, would be too narrow and technical. The word as commonly used has a more comprehensive meaning. It is a formal embodiment in language of matter communicated to another. It is, to express the particulars of; to represent fully in words; make known specifically; explain; narrate; to recite facts, etc.: See Century Dictionary. It is not necessarily limited to the statement of a fact or the substance of a case, but may include the provisions of a contract. The application, as we have seen, contained a warranty as to the correctness of the representations made, and also a waiver of the applicant's right to exclude the evidence of physicians who had treated him. He stated that he warranted and that he waived, and, from allusions made in the certificate thereto, the conclusion is irresistible that it was the intention of the parties to make the warranty and the waiver a part of the contract.

A more serious question is presented with reference to the waiver. It is contended that a waiver before the trial is against

public policy, and that the law at the time of the trial did not permit it. The law, as it stood at the time the contract was made, provided that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity": Code Civ. Proc., sec. 834. Section 836 provided that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient, or the client." At the time of the trial, the last section had been amended so as to require the waiver to be made upon the trial. It will thus be seen that the right to waive is given by the express provisions of the code. The right of the legislature ²⁰² to establish rules of evidence and to make them applicable to all trials thereafter had is unquestioned, but it cannot pass an act impairing the obligations of a contract. The waiver, as we have seen, was a part of the contract. It was made to induce it. It was authorized by the code and is binding upon the parties, unless the making of it at that time was against public policy.

In *Matter of New York etc. R. R. Co.*, 98 N. Y. 447-453, Earl, J., in delivering the opinion of the court, says: "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and, generally, all stipulations made by the parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts."

In *Matter of Coleman*, 111 N. Y. 220, an attorney of the testator was requested to sign the attestation clause of the will as a witness. It was held that this was an express waiver within the meaning of section 836 of the code. In this case, it will be seen that the waiver was before the death and intended to take effect after death upon the probate of the will. Ruger, C. J., in delivering the opinion of the court, says with reference thereto: "It

cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the ²⁰³ statute, and can it be any less so when the client has left written and oral evidences of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not: *McKinney v. Grand Street etc. R. R. Co.*, 104 N. Y. 352. The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove."

In *Adreveno v. Mutual Reserve etc. Assn.*, 34 Fed. Rep. 870, the action was upon a certificate of insurance which contained a clause of waiver similar to the one we have under consideration. The statute of Missouri provided that: "The following persons shall be incompetent to testify: A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon." Thayer, J., said: The statute is construed in this state as conferring a privilege merely that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of *Cahen v. Continental Life Ins. Co.*, 41 N. Y. Super. Ct. 296; *Grand Rapids etc. R. R. Co. v. Martin*, 41 Mich. 667. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waves it, as in this case, by a clause contained in the contract on which the suit is brought; and, if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on anyone who claims under the ²⁰⁴ contract, whether it be the patient himself or his representative": See, also, *Alberti v. New York etc. R. R. Co.*,

118 N. Y. 77-85; Rosseau v. Bleau, 131 N. Y. 177-184; 27 Am. St. Rep. 578. It appears to us that these cases dispose of the question under consideration; that the waiver is not in contravention of any principle of public policy, and that the amendment to section 836 of the code, made after the contract, has no application.

The judgment should be affirmed, with costs.

All concur, except Martin, J., not voting.

INSURANCE—LIFE—REPRESENTATIONS.—False answers to questions regarding health of applicant will avoid a policy of insurance: *Brown v. Metropolitan etc. Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894, and note. Where one asserts that certain statements are true, and if not true that this fact shall avoid a policy of insurance, the question whether they were material is not important, as the parties have the right to make their truth the basis of the contract: *Cobb v. Covenant etc. Assn.*, 153 Mass. 176; 25 Am. St. Rep. 619, and note. This subject will be found fully discussed in the extended notes to *Continental etc. Ins. Co. v. Yung*, 3 Am. St. Rep. 635; *Continental etc. Ins. Co. v. Rogers*, 59 Am. Rep. 816, and *Day v. Mutual etc. Ins. Co.*, 29 Am. Rep. 575.

PHYSICIANS AND SURGEONS.—WAIVER OF PRIVILEGED COMMUNICATIONS TO, is discussed in the extended note to *Thompson v. Ish*, 17 Am. St. Rep. 566, 570.

BARKER v. CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY.

[151 NEW YORK, 237.]

STREET RAILWAYS—DUTY TO MAKE CHANGE.—A tender by a passenger of a five-dollar bill in payment of five cents fare is unreasonable, when the rules of the company do not require its conductors to furnish change beyond the amount of two dollars; and it is not material that the existence of the rule be known to the passenger. The conductor has a right to eject him from the car, though he has no other means with which to make payment.

CARRIERS NEED NOT BRING HOME TO EACH PASSENGER KNOWLEDGE OF ANY REASONABLE AND JUST RULE which such carriers are seeking to enforce.

CARRIERS—RULES—QUESTION FOR JURY.—Whether a rule adopted by a carrier of passengers is reasonable is not a question of fact for the jury, but of law for the court, when the facts are not in dispute, and are not of such a nature that reasonable men may differ in regard to the inference proper to be drawn from them.

Samuel H. Ordway, for the appellant.

Henry Thompson and Henry A. Robinson, for the respondent.

340 **BARTLETT, J.** This appeal presents a novel question which has not been considered by this court in any case to which

our attention has been called. No opinion was written in the court below.

The defendant corporation operates a horse railroad in the city of New York as a common carrier of passengers. On the 12th of January, 1889, the plaintiff entered one of the defendant's cars as a passenger, and, when called upon for his fare of five cents, found that the smallest amount of money in his possession was a five-dollar bill.

The plaintiff offered the bill to the conductor, who stated, "I am not supposed to change it; you must get off." To this the plaintiff replied, "I won't get off; you must put me off." The conductor thereupon put the plaintiff off the car. It is not claimed that he used any more violence than was necessary, or that the plaintiff was actually injured in person or property.

The transaction was undoubtedly a technical assault and battery, and the plaintiff seeks in this action to recover his damages therefor. It may be conceded, as was urged by plaintiff's counsel in his very able argument, that if plaintiff was unlawfully ejected from the car, this is a case for substantial damages. A number of points were discussed at the bar, but in the view we take of this case there is but one question to be considered.

The plaintiff's counsel asked to go to the jury on several questions and among others the following: "Whether the five dollars was, in this case and under the circumstances testified to, a reasonable amount for the plaintiff to tender the conductor in payment of his fare?" The complaint was dismissed at the close of the plaintiff's case, and the point is made whether the reasonableness of the tender of five dollars to the conductor is a question of law or a question of fact on the evidence.

It was stipulated at the trial that the defendant had a rule requiring their conductors to be prepared to furnish change to ²⁴¹ the amount of two dollars, and that such rule was not brought to the attention of plaintiff. It was further stipulated that there was no regulation forbidding the conductors to make change to a greater extent than two dollars.

On cross-examination of the plaintiff he testified as follows: "Q. Why did you say to the conductor, before making any tender, 'I have only got a five-dollar bill?' A. Well, because I felt rather apologetic about offering that large amount, because I didn't know whether it might inconvenience him with using up a great deal of his change or not, and, of course, I wouldn't have offered five dollars if I had anything else, and I wanted to ex-

plain it." It thus appears that the plaintiff regarded his offer of the five-dollar bill as unusual and requiring explanation.

There is no evidence of a custom on the part of the plaintiff or the public of tendering to defendant five dollars in payment of a five-cent fare and receiving the change, nor of any rule of the defendant imposing upon their conductors the duty of furnishing passengers with change in so large an amount. The plaintiff swore to one occasion when he had offered a five-dollar bill for his fare and had it changed, but it was on the car of another line.

There is no evidence which would have warranted the trial judge in submitting to the jury the question whether the plaintiff's tender of the five-dollar bill under the circumstances was unreasonable.

On the evidence as it stands, the plaintiff's tender of the five-dollar bill was unreasonable as a matter of law, and the undisputed facts are not of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them.

In this state of the record it is well settled that there is no question for the jury: *Vedder v. Fellows*, 20 N. Y. 126; *Hibbard v. New York etc. R. R. Co.*, 15 N. Y. 455, 459, 460; *Avery v. New York Cent. etc. R. R. Co.*, 121 N. Y. 31, 44.

²⁴² It is quite apparent that a carrier of passengers must make and enforce such reasonable rules as will enable it to discharge its duties to the general public in a proper manner, and, if the facts are undisputed and not susceptible of different inferences, the question of their reasonableness ought not to be submitted to a jury who might not readily understand the reasons upon which the rule is sought to be founded. If the question is treated as one of law uniformity is secured, a matter in which the public are interested quite as much as the corporations who are carriers of passengers.

In the case at bar, the reasonableness of the rule established by the defendant is obvious. In a large city like New York the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change.

When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars.

It would require conductors to carry a large amount of bills

and small change on their persons, and greatly impede the rapid collection of fares.

It is not necessary that a common carrier should bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce; to so hold would render the enforcement of the rule impracticable.

We have been cited to but one case holding with the plaintiff in this action: *Barrett v. Market Street Ry. Co.*, 81 Cal. 296; 15 Am. St. Rep. 61.

We agree with the learned supreme court of California, that a passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount, but we cannot assent to the conclusion that a tender of five dollars is a reasonable sum.

²⁴⁸ It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece was practically the lowest gold coin in use in that section of the country.

The plaintiff urges that there are several other questions than the one of reasonableness of amount tendered that should have been submitted to the jury. We have considered these questions in the light of the record as it stands, and are of opinion that the dismissal of the complaint was proper.

The judgment appealed from should be affirmed, with costs.

All concur.

STREET RAILWAYS—DUTY TO MAKE CHANGE.—The tender of a five-dollar gold piece by a passenger on a street-car, who has no smaller change with him, is a tender of a reasonable sum, and, if he makes such tender, he cannot be ejected for refusal to pay his fare: *Barrett v. Market Street Ry. Co.*, 81 Cal. 296; 15 Am. St. Rep. 61.

RAILROADS — REGULATIONS — REASONABLENESS—QUESTION FOR COURT.—The reasonableness of rules prescribed by railroad companies and like corporations is a question of law to be decided by the court and not the jury: *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40; 23 Am. St. Rep. 506, and note; *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138, and note. See, also, the extended note to *Commonwealth v. Power*, 41 Am. Dec. 471.

RAILROADS.—Passengers are not required to know the rules and regulations made by the directors of the company for the management of its affairs and for the control of the actions of its agents: *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859, and note.

KIMMER v. WEBER.

[151 NEW YORK, 417.]

MASTER AND SERVANT—FELLOW-SERVANTS.—If workmen find it necessary during their work to erect scaffolding, and, by the negligence of any of them, such scaffolding breaks, and injures one of their number, he cannot recover of the common employer, because the injury is due to the negligence of his fellow-servants.

MASTER AND SERVANT—DETAILS FOR WHICH MASTER IS NOT ANSWERABLE.—If a gang of masons are at work upon a building, and the construction of a platform becomes necessary to the prosecution of their work, this is one of the details of the business which is generally left to the workmen themselves, and when the master does not take it out of their hands, nor furnish defective materials to be used in it, and it is in fact constructed by the workmen according to their own judgment, and, through some defect in its construction, one of them is subsequently injured, the master, or common employer, is not answerable.

A MASTER IS NOT RESPONSIBLE FOR THE NEGLIGENT PERFORMANCE OF SOME DETAIL OF WORK intrusted to a servant, whatever may be the grade of the servant who executes such detail, though by his negligence, or want of judgment, another servant is injured. If the work is the work of the servant, and he undertakes to perform it, and the master is not at fault in not furnishing proper materials, there is no breach of duty on his part.

MASTER AND SERVANT—ERROR OF JUDGMENT ON THE PART OF FOREMAN.—If workmen have constructed a scaffolding for their use, and a third person, thinking it insufficient and unsafe, calls the attention of the foreman of the builders thereto, who replies that he thinks it will do, and it subsequently proves insufficient, and through its defects injures one of such workmen, the common employer is not answerable. The construction of the scaffolding was a detail of the work with which the workmen themselves were charged, and the foreman had a right to trust to their own judgment in the matter. All of the employes who concurred in determining that the scaffolding was safe may be regarded as fellow-servants.

MASTER AND SERVANT—ADOPTION OF UNSAFE SCAFFOLDING.—If, when a gang of workmen commence work on a building, they find there a scaffolding which had been used by other workmen, and use it or adopt it as part of a scaffolding to be used by them without any direction from the common employer, he is not answerable for defects therein from which one of such workmen receives injury.

Hamilton Wallis, for the appellants.

E. B. Barnum, for the respondent.

419 **O'BRIEN, J.** The plaintiff's intestate was an apprentice in the employ of the defendants, who were builders. This young man was killed on the 16th of February, 1891, by the falling of a scaffold used by the defendants' workmen in their business. The question was, whether the accident was the result of negligence on the part of the defendants. The jury found that it was, and the inquiry is, whether the proofs in the case sustain the finding. The defendants had a contract for the mason work of

a brewery, which was in process of erection. There was also a gang of carpenters and a gang of plumbers at work upon the building, each under separate contracts with the owner. The plumbers engaged in fastening pipes upon the ceilings of the different floors made use of a scaffolding which had been constructed for them by one of the carpenters. It was first used in the cellar, then removed to the first floor and used for the same purpose, and then taken down and removed to the floor above. The ceiling of this floor being higher than the others, the plumbers found it necessary to raise the height of the scaffolding. They procured the same carpenter to make the change. This was done by extending the uprights by means of pieces of timber nailed to them and fastened by cleats. It seems in that form to have answered all the purposes of the plumbers. It consisted of three planks supported on crosspieces fastened to the uprights, and was left by the plumbers in the room when they had completed ⁴²⁰ their work. Neither the defendants nor any of their employes had anything whatever to do with the construction or use of the scaffolding. About two weeks before the accident, the defendants sent a gang of masons to the building, of which the deceased was one, to point up the arches of the ceiling. The defendants' foreman gave the men instructions to make a scaffolding for themselves with three horses furnished by defendants, by placing planks on two of them and using the third to extend the scaffold as they passed around the room.

The place furnished to the masons to do the work was in a general sense the room or second floor of the building, and it is not claimed that this place was in any sense unsafe. The erection of the scaffolding was a detail of the work which it is apparent devolved upon the workmen themselves as they needed it to move around the room. It is not claimed that the defendants failed to provide proper material for the construction of such a scaffolding. The workmen, of whom the deceased was one, constructed the scaffold according to their own judgment. They used this plumbers' scaffold for one side of it, and placed a structure against the wall for the other side. From this structure to the plumbers' scaffold crosspieces were placed upon which planks rested to accommodate the workmen. The scaffolding thus constructed was used for about two weeks and moved about the room as occasion required, all of which seems to have been done by the workmen themselves.

The crosspieces, or some of them, seem to have been heavy pieces of timber, and, on the day of the accident, two of the work-

men were engaged in putting one of these timbers in place. While so engaged, one of the men let fall the end of the heavy timber that he was holding, and it crushed by its sudden fall and broke one of the crosspieces of the plumbers' scaffold. This caused the whole scaffold to fall, resulting in the injury and death of the plaintiff's intestate.

The accident was evidently caused by the neglect of the workmen who were handling the timber or by some defect in the crosspiece of the plumbers' scaffold. If the accident is ⁴²¹ to be attributed to the act of the workmen who were engaged in putting the timber in place, there is nothing in the case to show that the defendants are liable for the misconduct. They were coservants, and nothing appears to charge the defendants with negligence either in employing them originally or in retaining them. It is not suggested that the judgment can be upheld on such grounds.

The judgment must stand, if at all, upon the fact that the plumbers' scaffold was used as a part of the scaffolding for the masons, and that it was insufficient. When the case is examined in that light, it will be found, we think, that there was no proof of negligence on the part of the defendants to warrant the submission of the question to the jury.

It does not appear that the defendants constructed the plumbers' scaffold, or furnished it, or directed the workmen to use it. On the contrary, it appears that this scaffold was a contrivance adopted by the workmen themselves. It does not appear that they were obliged to use it. When a gang of masons are engaged in plastering or pointing a room, the construction of proper platforms or places upon which to stand while doing the work is one of the details of the business that is generally left to the workmen themselves. The master may, it is true, take this out of their hands and assume to do it himself, and, in that case, he would be bound to furnish an appliance reasonably safe and suitable for the purpose. But in this case it does not appear that the master was required to furnish the platform or that he did furnish it, nor does it appear that there was any neglect or failure to furnish proper or suitable material for that purpose. It required horses, crosspieces, and plank, and the means to put them in place. The evidence indicates that all these things were on hand, and that they were used by the workmen according to their own judgment. In constructing the scaffolding, they made use of another, which had been constructed previously by the plumbers for their own purposes, and which proved for

them safe and sufficient. If this contrivance was defective or insufficient for the new use to which it was applied, and there is no ⁴²² proof of that except the fact that one of the crosspieces broke under the weight of a falling timber, it is difficult to see how the master can be held responsible. The scaffolding having been constructed by the workmen themselves, or under their direction, if the appliances which they made use of for that purpose were in any respect defective or insufficient, they had, so far as appears, the same means of knowing that fact as the defendants. It was not enough to prove that the scaffolding gave way under the circumstances, resulting in an accident, or that it was in fact defective, unless it was made to appear that this was the proximate result of some omission of duty on the part of the defendants or their foreman. If they furnished suitable materials for the construction of a proper platform, and the workmen themselves constructed it according to their own judgment, the defendants were not liable for the manner in which they used the material so furnished: *Hussey v. Coger*, 112 N. Y. 618; 8 Am. St. Rep. 787; *Webber v. Piper*, 109 N. Y. 496; *Hogan v. Smith*, 125 N. Y. 774; *Cregan v. Marston*, 126 N. Y. 568; 22 Am. St. Rep. 854; *Butler v. Townsend*, 126 N. Y. 105; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31; *McCampbell v. Cunard S. S. Co.*, 144 N. Y. 552.

The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who executes such detail. If it is the work of the servant, and he volunteers to perform it, and the master is not at fault in furnishing proper materials, there is no breach of duty on the part of the latter: *Cullen v. Norton*, 126 N. Y. 1; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616.

There is some evidence in the case to the effect that, when the masons were at work on this scaffolding, one of the plumbers called the attention of the defendants' foreman to the fact that the plumbers' scaffold, which was part of that used by the masons, was insufficient, and that the foreman replied that he thought it would do. This the foreman denies, and says that he was not aware that the plumbers' scaffold was in use till after the accident.

⁴²³ But, assuming that his attention was so called to the matter, as testified to by this witness, was the foreman guilty of negligence, attributable to the master, in permitting the workmen to go on with the work upon the platform that they had erected

to suit themselves? If his judgment was wrong with respect to the sufficiency of the platform, so was that of the workmen. They knew as much with respect to the safety of the place where they stood as he did. None of the masons suggested to any one that the scaffold was unsafe. Whatever was said on that subject was by one of the plumbers when he saw the men using their scaffold. If, under these circumstances, the foreman had refused or declined to interfere with what had been done by the workmen, and he trusted to their judgment, it was not such negligence as to charge the defendants with the result of the accident. It was, at most, but an error of judgment on the part of the foreman with respect to a detail of the work in which the masons were engaged. He concluded, as the workmen themselves did, that the place was safe, and in determining that question they were all coservants.

We think that the plaintiff failed to make out a case for the consideration of the jury for these reasons: 1. It was not shown that it was the duty of the master, under the circumstances, to construct the platform on which the masons were to do the work; 2. The proof shows that this duty was assumed by the workmen as one of the details of the work; 3. It was not shown that the defendants, or their foreman, actually constructed or directed the construction of the platform; 4. It was not shown that the plumbers' scaffold which gave way was any part of the material furnished by the defendants or the foreman, or that they contemplated the use of it for the purpose to which it was put.

It did not belong to the defendants, but was in the building; and, if the workmen made use of it for the purpose, without any direction from the defendants, or any knowledge on their part, the result is not chargeable to the master. It appears to have been in use for ten days by the masons, who ⁴²⁴ moved it about the room from place to place as the work required, and it gave way only when a large beam was allowed to fall upon it by one of the workmen. The proof, as it appears in the record, was not sufficient to warrant a finding of negligence against the defendants.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except Gray, J., dissenting.

MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY OF MASTER FOR NEGLIGENCE OF.—A master is not answerable to a servant for injuries inflicted on him by the negligence of another

servant in the same common employment and not traceable to the personal negligence of the master: *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note; *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458; 43 Am. St. Rep. 259, and note; *Greenway v. Courroy*, 160 Pa. St. 185; 40 Am. St. Rep. 715, and note. See, also, the extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455.

BIERMAN v. CITY MILLS COMPANY.

[151 NEW YORK, 482.]

PRINCIPAL AND AGENT—RATIFICATION OF WARRANTY.—A ratification must be with full knowledge of the agent's acts. Therefore, if a person, assuming to act as agent for another, makes a sale of the latter's goods with a warranty of quality, or fitness for some specific purpose, and the owner, on being advised of the sale, ratifies it, such ratification does not include a warranty of which he had no notice.

PRINCIPAL AND AGENT.—AN AGENT TO SELL HAS NOT IMPLIED AUTHORITY TO WARRANT the property sold, unless the sale is of a class which is ordinarily accompanied by a warranty.

WARRANTY IMPLIED IN THE SALE OF ARTICLES TO BE MANUFACTURED.—If a sale is made of articles to be manufactured, there is an implied promise that the articles to be delivered shall be marketable and free from any remarkable defect.

SALES—THE MAXIM OF CAVEAT EMPTOR DOES NOT APPLY TO SALES BY A MANUFACTURER.—He is liable for any latent defects arising from the processes of manufacture or the use of defective materials, upon the ground of an implied warranty.

MANUFACTURER, LIABILITY OF.—If goods to be delivered are sold, though by a person not authorized to represent the manufacturer, and he affirms the sale, his adoption of it charges him with notice of the use to which the goods are to be put, and imposes on him the duty of furnishing goods which are marketable and reasonably fit for use, and renders him answerable for any consequent liability for a failure attributable to defects in the process of manufacture or in the materials employed.

IMPLIED WARRANTY, WHEN NOT WAIVED BY THE USE AND RETENTION OF GOODS.—If a manufacturer sells felt, to be used in the making of clothing, and upon its delivery to the purchaser, it is so used by him, he does not waive an implied warranty in his favor if a defect existed in the felt which was not discoverable upon inspection, and could not be ascertained except by actual wear.

Sol Kohn, for the appellants.

Edward Hinman, for the respondent.

485 **GRAY, J.** The plaintiffs brought this action to recover damages of the defendant for a breach of warranty in the sale of felt cloths; and, as there was no written contract at the time, it is essential to know the facts and circumstances, under which the sales were made. The plaintiffs were engaged in business in

the city of New York, as manufacturers of clothing. The defendant, a Massachusetts corporation, was engaged in the business of the manufacture and sale of felt goods. The plaintiffs allege that the defendant, through its lawfully authorized agent, had represented to them that it manufactured a certain kind of cloths, fit for their use in the manufacture of coats and had requested them to purchase some. They further alleged that, relying on the representation, they had purchased such cloths and had manufactured them into clothing; ~~and~~ that they subsequently discovered that the cloths were "damaged, of an inferior quality, rotten, and unfit for any purpose whatever," and that the defendant had concealed the defects from the plaintiffs. They alleged that the defect was a latent one and not discoverable by inspection, and was indicated by wear; that many of the goods sold by the plaintiffs had been returned to them, and that they had on hand a number of said coats, which they had been unable to dispose of. The answer denied that the defendant had made any representations to the plaintiffs, as alleged, and denied the other allegations of the complaint respecting the cloths sold, and set up as a defense that the goods purchased by the plaintiffs were first-class articles of their kind and suitable for the manufacture of low-priced coats. Upon the trial of the issues, the plaintiffs gave evidence that they had not purchased felt goods to be manufactured into clothing, until they made the purchases from the defendant; which occurred in the spring of 1890 at the plaintiffs' place of business in New York. The purchase was made through a Mr. Nichols, who showed them a sample of the cloth and stated that it would make a splendid ulster; that it wore like buckskin, and that he had an ulster made from the goods which he had worn for two years. Upon these statements, and at the price of a dollar a yard, the plaintiffs told him that, "if he could warrant the goods," they could use a very large quantity. Mr. Nichols said, "he would warrant it to wear," and thereupon plaintiffs told him to send in a few pieces of the goods to be made up into a lot of ulster samples; and orders were then and subsequently given for cloths to be made up into ulsters for the fall trade, which were filled by the defendant. Plaintiffs gave evidence that they entirely relied upon Mr. Nichols' statements as to the quality of the goods and had no knowledge regarding the wear of the cloth, when manufactured into ulsters. Plaintiffs proceeded with the manufacture of these goods through the summer months, to the extent of thirteen hundred and twenty-six ulsters; of which they

sold one thousand and twenty-seven throughout the country. Subsequently, ulsters were returned to the plaintiffs in a damaged condition, with holes in them, or ⁴⁸⁷ "broken," or with "tender places" in them. The number of coats returned in a damaged condition was two hundred. The custom of the plaintiffs, when goods were received, was to examine them before sending them out to be manufactured into garments and then, when returned, the garments are again thoroughly examined. Witnesses, familiar with felts, testified as to how they were made and that, unless made with stocks or fibres sufficiently long to hold the short stocks or fibres together, upon exposure, the stocks will "creep," or draw away from each other. They testified, upon examining the ulsters in question, that the greater portion of the stocks, from which they were made, had been short stocks; that after exposure, where the felt is not properly worked, the short stocks draw away from the long stocks and that the breaks in these ulsters were attributable to that cause. There was also testimony by a dealer in felt goods, who was familiar with the process of manufacturing and who had sold felt goods for overcoatings, that if made of proper materials, they would wear well and that the way of testing felt for durability and quality was only by actual wear; unless "you try every square inch of the goods." At the conclusion of the plaintiffs' evidence they had shown that the felt cloths, which they had purchased of the defendant, when made up into these overcoats and sold to customers, had proved, at least to a certain extent, to be so defective in their manufacture and were such "tender" goods, that holes, or breaks, appeared in the garments; that two hundred of them had been returned and two hundred and ninety-nine were left unsold and were of no value. If their evidence is to be believed, these defects resulted from improper processes of manufacture, and were only discoverable after exposure upon being worn. On behalf of the defendant, there was evidence to the effect that Nichols had never been in its employ, and, upon his examination, he denied the representations attributed to him by the plaintiffs. He admitted that he had said that this felt cloth was a good thing for an overcoat, and that he knew it was to be used for that purpose by the plaintiffs. He testified that he was not a manufacturer of felts, and that the ⁴⁸⁸ goods he sold to the plaintiffs were to be delivered by the defendant. There was also evidence for the defendant, given by its superintendent, that the felt delivered was a reasonable merchantable article for the price, and

that there was an ordinary and easy test for detecting the tenderness of the materials by pulling it in a certain way. A manufacturer of felts, examined for the defendant, testified that he attributed the "creeping" in the goods to a great extent to the rubber linings, which the plaintiffs had added to the coats in manufacturing them.

When all the evidence was in, on motion of the defendant, a verdict was directed in its favor and the request of the plaintiffs for leave to go to the jury upon the question of fact, upon the question of whether there was an express or implied warranty and upon the question of the damages, was denied and an exception was taken to that denial. The general term affirmed the judgment entered at the trial term, and we are required upon this appeal, as the main question, to consider the correctness of the disposition made of the case by the trial court. Although the plaintiffs failed to sustain their allegation that the defendant had made certain representations to them respecting the goods, through an agent authorized to make the same, and, therefore, failed to establish an express warranty on the part of the defendant, their complaint contained, by a liberal construction, a sufficient cause of action for the recovery of damages for the breach of an implied warranty that the felt goods sold were fit for the plaintiffs' business in the manufacture of overcoats, and that they were merchantable and free from any remarkable defect. The plaintiffs proved no custom to the effect that such sales were usually attended with a warranty, and, therefore, in the absence of such proof and because of the failure to show any express authorization by the defendant to Nichols to sell, it cannot be said that any express warranty accompanied the sale. Nor did the ratification of Nichols' act, through the adoption of the sale by the delivery of the felts, bind the defendant to make good his warranty, or all of his representations. The rule is well ⁴⁸⁰ settled that ratification must be with full knowledge of the agent's acts. Even if Nichols had been employed to sell the goods, unless he was given express power to warrant, he could not give a warranty which would bind his principal; unless the sale was one which was usually accompanied with warranty: *Smith v. Tracy*, 36 N. Y. 79. In *Wait v. Borne*, 123 N. Y. 592, we held that, "the idea upon which is founded the right to warrant, on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him. And if, in the sale of that kind or class

of goods thus confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority. If the agent, with express authority to sell, has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty.

The question here, however, is one of a sale, where the seller was the manufacturer of the article sold, and the contract being executory in its nature and for the delivery of something of a particular kind, there was the implied warranty, or promise, that the article to be delivered should be merchantable and free from any remarkable defect. Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197, after reviewing decisions illustrative of when the rule of caveat emptor does or does not apply in sales, stated as one of the results as follows: "Where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article." The same principle was laid down in *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572, and in *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, with respect to the obligation of a seller, under an executory contract to deliver an indeterminate thing of a particular kind, that it shall be free from any remarkable defect. ⁴⁹⁰ In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, after a review of the leading cases bearing upon the point, it was held that "when the seller is the maker or manufacturer of the thing sold, the fair presumption is, that he understood the process of its manufacture, and was cognizant of any latent defects caused by such process and against which reasonable diligence might have guarded. . . . When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use." Quite recently, in the case of *Carleton v. Lombard*, 149 N. Y. 137, which was an action to recover damages for the breach of an executory con-

tract for the sale of petroleum, produced by the defendant through certain manufacturing processes, we had occasion to consider the question of the liability of the seller for any latent defect arising in the process of the manufacture and the principle of the decisions in *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, and in *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, was affirmed. We held there that the maxim *caveat emptor* does not apply to the case of a manufacturer, who sells goods of his own manufacture, and that, in such a case, he is liable for any latent defects arising from the process of manufacture, or in the use of defective materials, upon the ground of an implied warranty. In *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, Selden, J., commented upon this exception to the general rule and held it to be a just one, using this language: "Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied."

⁴⁹¹ The principles of adjudged cases apply to the one before us. The defendant was the manufacturer of the article, which it sold to the plaintiffs, and the circumstances of the case were such as to imply a promise on its part that the article, which it manufactured and delivered to the plaintiffs, should be free from any latent defect. It was under the obligation to furnish an article, not of the higher quality necessarily, but one that was merchantable and free from any remarkable defect arising from the process of manufacture. Although there is no evidence that Nichols was expressly empowered to represent the defendant in the transaction, the adoption of his assumed agency to sell its product charged it with knowledge of the use to which that product was to be put and imposed the duty of delivering goods, which should be merchantable and reasonably fit for that use, and a consequent liability for a failure, attributable to defects in the process of manufacture or in the materials employed. We must differ with the general term in the supposition, as expressed in the opinion, that there was no evidence that the goods could not be made into coats which would stand the wear of ordinary felt cloths, and, therefore, that it was not shown that the goods were unmerchantable, and in the further supposition that the strength of the goods could have been tested in the ordinary manner, and that there was no latent defect discoverable upon use. The learned justices have overlooked the evidence in behalf of the plaintiffs in these respects. To be sure, that may have been the effect of the evidence introduced on behalf of the

defendant; but it was in conflict with the plaintiffs' evidence. If the evidence of the plaintiffs is to be believed, the defendant improperly manufactured the felt cloth, or certainly some of it, which was delivered to the plaintiffs, by using what was called too short stock, or shoddy, as a consequence of which the cloth was "tender" and "uneven" and liable to separate, and "breaks," or holes, would appear upon exposure by wear. The evidence tended to show, on behalf of the plaintiffs, that the defect in the cloth was not discoverable upon inspection, and could not be tested as to its durability and quality, except ⁴⁹² by actual wear. The use of improper stock in the manufacture of the cloth might only make it tender and unserviceable in particular places, and, therefore, this was not a case where the plaintiffs could be said to have been concluded by their acceptance and retention of the cloth for manufacturing into ulsters. The obligation of the defendant would survive the plaintiffs' acceptance of the goods, if the latent defects were not discoverable upon inspection. Upon all the evidence, the case should have been submitted to the jury, to determine whether there had been a breach of an implied warranty that the felt cloth should be merchantable. It was for them to say whether it was unmerchantable and unfit for plaintiffs' purposes, because of the use of defective material, and, if they believed the evidence to that effect and that the defect was not discoverable by the plaintiffs upon the usual and ordinary inspection and tests in such cases, they would be justified in awarding damages to the plaintiffs; measured by the loss shown by them to have been actually sustained, in the return upon their hands of defective ulsters, as well as in the manufactured coats left on hand, if unsalable because valueless through defects in the material from which made.

For the error, therefore, committed by the trial court in directing a verdict for the defendant, there must be a new trial of the issues, wherein the cause may be submitted to the jury upon the evidence. Some of the rulings upon the admission and rejection of evidence are open to the criticism of excessive strictness against the plaintiffs, if not actually erroneous; but, as there must be a new trial, they will not be discussed.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

AGENCY TO SELL.—POWER TO WARRANT.—A seller is not bound by express warranties made by an auctioneer or other spe-
AM. ST. REP., VOL. LVI.—41.

cial agent, unless he has specifically authorized such warranty: *Court v. Snyder*, 2 Ind. App. 440; 50 Am. St. Rep. 247, and note.

SALES OF ARTICLES TO BE MANUFACTURED—IMPLIED WARRANTY.—An executory sale by a manufacturer of a specific article of a well-recognized kind or description in the market, carries an implied warranty that the goods shall conform to the description, be of good material, and well made according to the description, but none that they shall answer the purpose for which they are purchased. As to this the rule of *caveat emptor* applies: *Wisconsin etc. Brick Co. v. Hood*, 60 Minn. 401; 51 Am. St. Rep. 539, and note.

SALES OF ARTICLES TO BE MANUFACTURED—LATENT DEFECTS.—If a manufacturer knowingly uses unsuitable and defective material in the manufacture of an article sold in the market by description, he is liable for any latent defect not disclosed to the purchaser: *Wisconsin etc. Brick Co. v. Hood*, 60 Minn. 401; 51 Am. St. Rep. 539, and note.

SALES—BREACH OF WARRANTY—DUTY TO RETURN GOODS.—If the capacity of machinery warranted by the seller is unknown to the purchaser at the time of the sale, and such purchaser buys, relying upon the warranty, he is not precluded from recovering his legitimate damages for a breach of such warranty, although he fails to return or offer to return the machinery upon discovery of its want of capacity, and fails to notify the seller thereof: *Larson v. Aultman*, 86 Wis. 281; 39 Am. St. Rep. 893, and note.

KNOPE v. NUNN.

[151 NEW YORK, 506.]

COTENANTS—LIABILITY OF COTENANT TAKING NOTE AND SECURITY IN HIS OWN NAME.—If, after a sale of real property by cotenants, one of them, without the assent of the other, delivers the conveyance, taking in his own name a note and mortgage for the whole purchase price remaining unpaid, he at once becomes, at the election of his cotenant, liable for the latter's share.

COTENANT—CONVERSION.—If one cotenant appropriates to his own use the whole of the proceeds of a sale of the common property without the consent of the other, the latter is entitled to treat the appropriation as a conversion, and to maintain an action therefor.

Patrick McIntyre, for the appellant.

John A. Bernhard, for the respondent.

507 MARTIN, J. In 1883, the father of the plaintiff and defendant died seised of certain real estate situated on Jay street in the city of Rochester, New York. Upon his death, one-third of the premises descended to the plaintiff as his heir at law, one-third descended to the defendant, and the remaining one-third to their brother, Gregory Nunn. In 1885, the latter sold and conveyed to the defendant his one-third interest therein, so that on June 5, 1889, the plaintiff and defendant were owners as ten-

ants in common of the real estate mentioned, the plaintiff owning one-third and the defendant the remaining two-thirds. On that day they united in executing a deed of the premises to Marcus Hirschfield for the consideration of five thousand dollars. After its execution, it was taken and retained by the defendant, to be delivered to the purchaser upon payment of such consideration. The defendant delivered it July 17, 1889, and the purchaser executed and delivered to him his bond and a mortgage upon the premises to secure the sum of four thousand dollars of the purchase price and interest ⁵⁰⁸ thereon, which, by their terms, was payable in four years with semi-annual interest. The remaining one thousand dollars had been previously paid. The bond and mortgage were taken by the defendant in his own name and were payable to him alone.

The purpose of this action was to recover of the defendant one-third of the purchase price of the premises, less the amount paid to the plaintiff thereon, the whole having been paid to the defendant, either in cash, or by executing and delivering to him the bond and mortgage mentioned.

The defendant, by his answer, in substance denied that he had received the consideration for which such premises were sold, alleged that he had paid the plaintiff more than her share of the amount actually received by him, and set up a counterclaim for money alleged to have been collected by the plaintiff as rent of the premises and retained by her to an amount in excess of her share or interest therein. The plaintiff, replying, denied her indebtedness for the rents mentioned, alleged that what she received was paid out under the direction of the defendant, and also pleaded the pendency of a former action between the parties in which the defendant's counterclaim was involved.

Practically the only question in this case, which relates to the plaintiff's affirmative right of action, is whether the defendant is liable to the plaintiff for her portion of the unpaid purchase price which was secured by the bond and mortgage to the defendant, although the money thus secured had not been actually received by him before the commencement of this action.

The record discloses evidence to the effect that the defendant gave credit to the purchaser and accepted in payment of four thousand dollars of the purchase money his bond and mortgage payable to the defendant alone without the plaintiff's knowledge or consent. That question was litigated upon the trial, but as there was a conflict in the evidence in regard to it and the

jury found for the plaintiff, its determination must be treated as final. There was evidence that the ⁵⁰⁹ plaintiff had collected nine hundred and twenty-seven dollars and forty-five cents for rents of the real estate owned by the parties as tenants in common, but it also tended to show that the amount thus collected had been paid out and disposed of by the plaintiff under the directions of the defendant.

At the close of the evidence, the defendant asked the court to direct a verdict in his favor upon the grounds that the plaintiff's claim was not due at the commencement of the action, and it was shown conclusively that the defendant had not collected the money for the sale of the real estate. He then asked the court to direct a verdict for the defendant for six hundred and ninety-eight dollars and ninety-six cents as the amount of rents which the plaintiff had collected over and above her share. Thereupon the court dismissed the defendant's counterclaim, on the ground that it was involved in a former action which was then pending between the parties, and held that there were two questions for the jury: 1. Whether the plaintiff authorized the defendant to take a bond and mortgage, or make any extension of the time of payment of any part of the purchase price; and 2. Whether, after she had ascertained that it had been done, she received any money upon it or acted in pursuance of it in a way to ratify the contract made by the defendant, and decided that if she did not authorize him to take a bond and mortgage in his own name, having done so without her consent, he was liable for her part of the purchase price. To this ruling the defendant's counsel excepted.

The defendant having taken the bond and mortgage, without recognizing that the plaintiff had any interest therein, is hardly in a situation to effectually assert as a defense that she was interested in the debt thus secured, and, therefore, cannot recover because it has not been actually received by him. The securities taken clearly import that they belong to the defendant alone, and the plaintiff elected to so treat them, which we think she was justified in doing: *Floyd v. Day*, 3 Mass. 403; 3 Am. Dec. 171; *Beardsley v. Root*, 11 Johns. 464; 6 Am. Dec. 386; *Chappell v. Dann*, 21 Barb. 17; *Allen v. Brown*, 51 Barb. 86, 92; 44 N. Y. 228. Under the circumstances and the facts as ⁵¹⁰ found by the jury, we think the plaintiff was at liberty to treat the action of the defendant, in delivering the deed to the purchaser without receiving the purchase price and taking a bond and mortgage for the remainder thereof in his own name with-

out her consent, as an appropriation to his own benefit of the share of the proceeds to which she was entitled, and to hold him liable therefor: *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231; *Wright v. Wright*, 59 How. Pr. 177, 184. When the defendant delivered the deed to the purchaser, and accepted his bond and mortgage payable to himself, the relation of the parties as tenants in common in the land was terminated. By thus taking security to himself alone, he totally ignored the rights of the plaintiff, and appropriated to his own use that portion of the purchase money which belonged to her. The appropriation of her portion, without her consent or knowledge, was a wrong, and amounted to a conversion of her interest which entitled her to recover the amount or value thereof: *Freeman on Cotenancy and Partition*, secs. 306, 307.

Nor do we find any exception to the refusal of the court to direct a verdict for the defendant that would justify a reversal of the judgment. The record shows that the question whether the defendant was entitled to recover, or to have allowed to him the whole or any portion of his counterclaim, was, if construed most favorably to him, one of fact; and as no request was made for its submission to the jury, nor any specific exception taken to its dismissal, we deem it unnecessary to consider the question whether the court was correct in the view taken as to the alleged counterclaim, on the ground of the pendency of a former action between the parties, in which that claim was involved.

As the questions already considered are the only ones material to a determination of this case, it follows that the judgment and order should be affirmed.

All concur, except Haight, J., not sitting.

Judgment and order affirmed.

CONVERSION BY COTENANT.—Where a tenant in common of goods sells the whole, his cotenant may treat it as a conversion and bring trover against his cotenant to recover his share: *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652, and note; *Delaney v. Root*, 99 Mass. 548; 97 Am. Dec. 52, and note. See, also, the extended note to *Bolling v. Kirby*, 24 Am. St. Rep. 817.

HERZOG v. HEYMAN.

[151 NEW YORK, 587.]

PATENT RIGHTS—DEFENSE OF WANT OF CONSIDERATION.—A holder of a patent may defend an action against him for the purchase price, if the patent is void. This is especially true if a decree has been rendered against the purchaser, though the vendor was not a party to the suit, and adjudging the patent to be an infringement, or otherwise depriving the purchaser of any beneficial use thereof.

LETTERS PATENT, IMPLIED WARRANTY AND SALE OF.—While it is possible for parties to enter into an agreement for the sale of the right, if any, which one of them has under letters patent, and by which agreement he is entitled to recover the price, whether the letters are valid or not, the evidence that such was the agreement should be very clear. Otherwise the parties will be assumed to have contracted for the transfer of a valid patent right, and the promise to pay the purchase price will be deemed without consideration and nonenforceable, if the patent is shown to be invalid.

LETTERS PATENT, AUTHORITY OF STATE COURT TO DETERMINE INVALIDITY OF.—In an action to recover the price agreed to be paid for the assignment of letters patent, the defense may be made that the agreement was without consideration, for the reason that the letters were invalid, and upon such defense being interposed in the state court, it has jurisdiction, as an incident of the action, to inquire into and determine the validity of the patent.

LETTERS PATENT, RESCISSION OF TRANSFER, WHEN NECESSARY.—In an action to recover the price agreed to be paid for an assignment to the defendant of letters patent, he is not, as a condition of interposing the defense of want of consideration arising from the invalidity of the patent, required to reassign to the plaintiff.

Abraham L. Jacobs, for the appellants.

Alan D. Kenyon, for the respondent.

589 **ANDREWS, C. J.** The agreement of April, 1888, was, in its main purpose, an agreement for the sale by the plaintiffs to the defendants of the patent No. 367212, for an improved filter, issued by the United States to one Klein, July 26, 1887, which had been assigned by the patentee to the plaintiffs. The agreement of the defendants to pay to the plaintiffs a royalty of fifty dollars on each machine which should be sold by them was the consideration which the plaintiffs were to receive for the sale and assignment of the patent. The contingency which would change the obligation of the defendants from a royalty to a percentage of profits has not happened, and need not be considered. The seventh defense demurred to by the plaintiffs embraces the defense of want of consideration. It alleges that on about the eighth day of July, 1889, a suit was brought in the United States circuit court in Pennsylvania by Simon Uhlmann and Fred

Uhlmann, against the Arnholt & Schaefer Brewing Company, for an alleged infringement of a patent issued by the United States to one Stockholm, for a filtering process, February 21, 1888, of which patent the said Uhlmanns were assignees; that the alleged infringement consisted in the use by the brewing company of one of the filters made under the Klein patent, sold to the company by the defendants; that the defendants on the sale guaranteed the company against suits for infringement based upon its use of the Klein machine; that they appeared and defended this suit, which resulted in a decree January 4, 1893, adjudging that the use of the Klein filter by the brewing company ⁵⁹⁰ was an infringement of the Stockholm patent and enjoining its further use, and awarding damages to the plaintiffs in the action. The defense demurred to further alleges that the defendants and their customers have been ousted and evicted from the use of the Klein filters, and the defendants have been prevented from making and selling them; that the plaintiffs had no exclusive right of manufacture or sale under the Klein patent, but that their right or claim was subordinate to the rights of the owners of the Stockholm patent, and that the right or claim under the Klein patent was incapable of use and worthless, and that the agreement sued upon was without consideration.

We think the defense demurred to was on its face a good answer to the action. The plaintiffs, not being parties to the suit in Pennsylvania, are not bound by the judgment rendered therein. But so long as the judgment stands, it is conclusive, as between the defendants and the owner of the Stockholm patent, that the Klein patent was an infringement of the Stockholm patent. The defendants can neither manufacture nor sell the Klein machine, and they are liable to the owner of the Stockholm patent for damages for all machines sold by them, whether before or after the commencement of the suit in the United States court. If, therefore, it should also be established as against the plaintiffs on the trial of this present action that the Klein patent infringes the Stockholm patent, it will follow that there was no consideration for the promise of the defendants. The doctrine that the purchaser of a patent may defend an action for the purchase price, if the patent is void, has been recognized in many cases: *Marston v. Swett*, 66 N. Y. 212; 23 Am. Rep. 43, and cases cited; 82 N. Y. 526. This is especially true where a decree has been found against the purchaser, rendered by a court of competent jurisdiction, adjudging the patent

to be an infringement, thereby depriving him of any beneficial use thereof, and subjecting him to account to the owners of another patent for damages upon all sales by him of the infringing machine, whenever they may have been made. It is insisted, however, ⁵⁰¹ that all that the plaintiffs agreed to sell, or the defendants attempted to purchase, were the letters patent No. 367212, irrespective of the fact whether they were valid or not. It was, as the plaintiffs insist, an agreement to sell their right, if any, under the letters, the defendants assuming the risk of their validity. It would, of course, have been competent for the parties to have entered into an agreement of the character suggested, but very clear evidence of such an agreement should be found before permitting a contract of the sale of letters patent to be so construed. The parties, generally, contemplate a transfer by the vendor to the vendee of an exclusive right vested in the former. "The thing to be assigned is not the mere parchment on which the grant is written; it is the monopoly which the grant confers; the right of property which it creates": *Gayler v. Wilder*, 10 How. 493. But reference to the agreement in this case discloses that the parties were dealing with what they regarded as a valid patent. It is recited that the parties of the first part (plaintiffs) "represent that they are the owners of certain letters patent"; that the parties of the second part "are desirous of acquiring a good and indefeasible title in and to said letters patent." It is declared that "in consideration of the foregoing recitals and of the payment," etc., an assignment shall be made of "an indefeasible title to said patent," and which assignment "shall vest in the parties of the second part the unquestioned right to said patent." It is further provided that so long as the parties of the second part shall manufacture and sell the filtering machines "embraced in and protected by said letters patent," certain things are to be done. The clear import of the agreement is, that both parties understood that they were dealing in respect to a real right secured under the patent, and that their mutual covenants were based on this assumption.

The point that the defense involved an inquiry by a state court as to the validity of a patent, and whether, as between two patents, one was an infringement of the other, which a state court has no jurisdiction to consider or determine, is not new. The issue made was, that the agreement sued upon ⁵⁰² was without consideration. This is one of the most ordinary questions involved in actions upon contract. The jurisdiction of a state

court to determine it is not precluded because the defense of want of consideration depends upon the construction or validity of a patent. The inquiry as to the validity of the patent comes in collaterally in determining the main issue of consideration, and of a question so arising the state courts have jurisdiction: *Marston v. Swett*, 66 N. Y. 212; 23 Am. Rep. 43; 82 N. Y. 526; *Ilyatt v. Ingalls*, 124 N. Y. 93; *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 356.

It was not necessary for the defendants to reassign the patent as a condition of interposing the defense. If they were seeking some affirmative relief, as a rescission of the agreement, or to recover money paid under the agreement, an offer to return the patent might be a condition precedent.

We think the demurrer was properly overruled, and the order should, therefore, be affirmed.

All concur.

PATENT RIGHTS—PURCHASE—VALIDITY OF PATENT.—A party entering into an agreement for the purchase of a patent right is not bound to go on with the contract if the patent turns out to be invalid: *Bellas v. Hays*, 5 Serg. & R. 427; 9 Am. Dec. 885. In an action brought to recover the price agreed to be paid for a patent right the defendant may, for the purpose of showing want or failure of consideration, prove that the patent is void for want of novelty: *Rice v. Garnhart*, 34 Wis. 453; 17 Am. Rep. 448; but see *Marston v. Sweet*, 66 N. Y. 206; 23 Am. Rep. 43, and *Jones v. Burnham*, 67 Me. 93; 24 Am. Rep. 10.

PATENT RIGHTS—JURISDICTION.—Federal courts have exclusive jurisdiction where the question of the validity of a patent is directly involved, and the state courts have no cognizance thereof, either at law or in equity: *Stemmer's Appeal*, 58 Pa. St. 155; 98 Am. Dec. 248. A state court has jurisdiction of an equitable action on a bond conditional upon the validity of a patent: *Middlebrook v. Broadbents*, 47 N. Y. 443; 7 Am. Rep. 457.

PATENT RIGHTS—SALE OF—RESCISSION.—One purchasing patent rights which are subsequently adjudged to be invalid, is entitled to rescind the contract of purchase and thereupon, on tendering a reassignment of such rights to be relieved from payment of such of the purchase price as remains unpaid and to recover back that part which has been paid: *Sandage v. Studebaker etc. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

KRAMER v. OLD.

[119 NORTH CAROLINA, 1.]

GOODWILL—WHAT IS SUBJECT OF SALE.—One who, by his skill and industry, builds up a business, acquires a property, at least in the goodwill of his patrons, which is the product of his own efforts; and his right of competition, to the full extent of the field from which he derives his profit, and for a reasonable length of time, is a subject of sale.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE ARE BINDING DURING LIFE.—If several persons engaged in a milling business, at a certain place, sell it, and agree not to continue the business of milling in that place, the contract will be construed as binding each seller during his life, and will be upheld as valid.

CONTRACTS—SINGLE CONSIDERATION WILL SUPPORT SEVERAL DISTINCT STIPULATIONS.—The single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do, or refrain from doing, certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE—VIOLATION OF—CORPORATIONS.—If several persons engaged in a business, at a certain place, sell it, and agree not to engage thereafter in the same business, in that place, it is a violation of the contract for any one, or all, of them to take stock in, help to organize, or manage a corporation formed to compete with the purchaser in such business. It is also a violation of the contract for the prohibited parties to furnish machinery, or capital, or a portion of either, in lieu of stock, in a corporation organized with a view of competing with the person protected by his contract against such injury.

INJUNCTION—CONTRACT IN PARTIAL RESTRAINT OF TRADE — RETAINING CONSIDERATION — CORPORATIONS.—If the owners of a business sell it, and have presumably received its full value, and which business is protected by their own agreement against their own competition, equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals.

INJUNCTION—CONTRACT IN PARTIAL RESTRAINT OF TRADE—WHO WILL BE PROHIBITED—CORPORATIONS.—If several persons engaged in business, at a certain place, sell it, and agree not to engage in the same business, at that place, but subsequently join with other persons in forming a corporation to engage in such business, at the place named, it is only the prohibited parties to the original contract who will be enjoined from engaging in, or from taking stock in, or assisting in, the organization of such corporation.

Action by C. E. Kramer and others against James Y. Old, W. T. Old, W. N. Old, and the Elizabeth City Manufacturing Company, to enjoin defendants from engaging in the milling business in Elizabeth City, state of North Carolina. The defendants Old were engaged in the milling business in Elizabeth City, and sold, for a valuable consideration, the business, land, buildings, and certain personal property to the plaintiffs, and stipulated in the contract that they would not continue the business of milling in the vicinity of Elizabeth City. It was not repeated in every paragraph of the contract that the stipulations made by the defendants Old were entered into for the consideration once expressed in the contract. The defendants Old discontinued their milling business in Elizabeth City, after the execution of the contract, and went into that business at Yeopim; but, after a failure to obtain a release from their contract not to engage in the milling business at Elizabeth City, the defendant corporation was formed for the purpose of evading this provision of the contract. It was organized by defendants Old to conduct a milling business in Elizabeth City. They owned a controlling interest in the company, and superintended it. One was a president, another a vice-president and manager, and the other a director. They furnished machinery for the manufacturing company, and were active parties in clearing up the site, erecting buildings, and moving their mill from Yeopim to Elizabeth City. No stock was issued in the defendant corporation. The plaintiffs alleged that it would work irreparable damage to them to allow the defendants to build their mill and operate it as they were attempting to do. A restraining order was continued until the hearing, and the defendants appealed.

W. J. Griffin, for the appellants.

E. F. Aydlett, for the appellees.

⁷ AVERY, J. The courts in later years have disregarded the old rules by which it was sometimes attempted arbitrarily to fix by measurement the geographical area over which a contract in partial restraint of trade might be made to extend, and to pre-

scribe a limit of time beyond which it could not be made to operate.

The modern doctrine is founded upon the basic principles that one who, by his skill and industry, builds up a business, acquires a property at least in the goodwill of his patrons, which is the product of his own efforts (*Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733), and has the fundamental right to dispose of the fruits of his own labor, subject only to such restrictions as are imposed for the protection of society either by express enactments of law or by public ^s policy: *Hughes v. Hodges*, 102 N. C. 239; *Bruce v. Strickland*, 81 N. C. 267. But the property which one thus creates by skill, or talent and industry, is not marketable, unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit, and for a reasonable length of time; *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; 2 High on Injunctions, sec. 1174; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 343; 39 L. J. Eq., N. S. 86; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Clark on Contracts*, 451. To the extent that the assignor of this species of property is left at liberty to come into competition with the assignee the market value of what is sold must fall below that of the untrammelled right to freedom from competition in the whole field from which the former derived the support of his business. The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the business or right of competition bought by him. The three defendants, who sold to the plaintiff, retained the undisputed right to continue in the same business and operate at any point beyond Elizabeth City and the vicinity, and exercised it by operating their mills.

But in our case it was not contended that the area of territory covered by the restrictive agreement was so unreasonably great as to vitiate the contract, but that the time for which the defendants covenanted to refrain from entering into the same business imposed an unnecessary restriction upon the rights of the three defendants, and was, therefore, contrary to public policy and void. It must be conceded that in so far as it is consistent with the power to sell the property which is the creation of one's own labor, physical or mental, society has the right to claim ^s an

open field for every man's labor, skill, and competition with others, both for the benefit of his family and the more direct benefits accruing to society from removing restrictions and encouraging competition in every kind of trade. The reason of the law leads to the adoption of any rule that is calculated to reconcile all conflicts between the proper exercise of the *jus disponendi* of the individual and the interests of society at large. The services of no one person are so valuable to the public, in any field to which his business may extend, as to demand that he shall receive a smaller price for his right of competition, because an arbitrary rule forbids him to extend the restriction in point of time to the term of his own life, or that of the purchaser, or for their joint lives. The enlargement of the restrictive area by later adjudications is founded, therefore, upon a principle which it was reasonable to apply in determining what is the lawful limit of time. Where the contract is between individuals or between private corporations, which do not belong to the quasi public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply: *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Morgan v. Perhamus*, 36 Ohio St. 517; 38 Am. Rep. 607; *Morse etc. Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513.

The stipulation on the part of James Y. Old, W. P. Old, and W. N. Old, to quote the exact language of the contract, is, "that they will not continue business of milling in the vicinity of Elizabeth City after the first day of September, 1891, and the full completion of this agreement." The contract having been in other respects performed, the agreement is now complete in the sense contemplated by the parties. The three defendants were at most restricted from engaging in the business for the lives of each and ¹⁰ every one of them. Such a sale has been upheld upon reason and authority in other courts. The plaintiff bought their right to compete in their own persons in the business to which he succeeded as purchaser. It was not unreasonable that he should insist upon the stipulation that none of the three should interfere while they lived, by competition at the particular place mentioned, either with him as purchaser, or his assignee in law or in fact. In the case of *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607, the facts were that a milliner sold her stock and goodwill, and engaged "not to carry on the

business at any time in future at the town of F., or within such distance of said town as would interfere with said business, whether carried on by said L. S. and P. or their successors." The agreement was held to be binding by the supreme court, and the seller was enjoined from resuming business. There, as in our case, the time was not described, except as an inhibition on a particular person, with the implication that it should extend to her life. The law would have construed the contract as conferring the right to sell or transmit to a personal representative as a part of the assets of his estate the property bought, whenever the time was found to be coextensive with the lives of the three defendants: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; *Clark on Contracts*, 454, 455, and note, 456; 2 High on Injunctions, sec. 1345; *Lewis v. Langdon*, 7 Sim. 422; *Binger v. Clark*, 60 Barb. 113. In *McClurg's Appeal*, 58 Pa. St. 51, the agreement, which was held not to be unreasonable, was that a physician who had sold his business and goodwill to another physician should "never thereafter establish himself as a physician within twelve miles (of his original place of business) without the consent of the purchaser." The contract there, like that under consideration, could be fairly construed in no other way than as operating for the term of the seller's life. These cases and ¹¹ others are cited with approval by text-writers, and seem as a rule to have established the reasonable doctrine contended for by the plaintiff in the states as well as in England: 2 High on Injunctions, sec. 1180; 1 Beach on Injunctions, sec. 462-470; *Whittaker v. Howe*, 3 Beav. 383.

It is elementary learning that the single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do or refrain from doing certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed. It is sufficient to set forth that A has paid, or agreed to pay, a certain sum, and that B has agreed to do, or abstain from doing, certain things which may be stated seriatim in separate paragraphs. A case almost exactly in point because it relates to a somewhat similar agreement, is that of *Morse etc. Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513.

Though the contract is valid and binding as between the parties, it in no way impairs the right of the defendants, who were not parties, to engage in any kind of business in Elizabeth

City. But, as a court of chancery, we must declare that, where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit, as well as the letter, of the agreement. Under a fair and just interpretation of its terms, the stipulation meant that the three defendants would not engage in business so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was, therefore, a violation of the contract on the part of the three mentioned, or either of them, to take stock in, help to ¹² organize, or manage a corporation formed to compete with the plaintiff in his business: *Jones v. Heavens*, L. R. 4 Ch. Div. 636.

While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague*, 114 N. C. 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals.

The judgment must be modified so as to restrain only the three defendants who were parties to the original contract from engaging in or from taking stock in or assisting in the organization of a corporation formed with the purpose of carrying on the business of milling in or in the vicinity of Elizabeth City. The order must be vacated as to the other defendants.

Modified and affirmed.

GOODWILL—CONTRACT IN PARTIAL RESTRAINT OF TRADE—INJUNCTION.—A sale of business, with the goodwill, secures to the purchaser the right to continue the old business at the old stand with the probability in his favor that the customers will continue to go there: *Vonderbank v. Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336. One who sells the goodwill of a business may be enjoined from injuring it: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297; note to *Frazer v. Frazer Lubricator Co.*, 2 Am. St. Rep. 81. Contracts in partial restraint of trade are valid: Note to *Oakdale*

Mfg. Co. v. Garst, 49 Am. St. Rep. 789. Therefore, a contract not to carry on a trade or business in a particular town or county is valid: Note to Chapin v. Brown, 32 Am. St. Rep. 301. A sale of the right to compete in a particular business or calling is valid and enforceable, if the rights of the public are not affected by restraining trade; and a breach of such contract will be restrained by injunction: Cowan v. Fairbrother, 118 N. C. 406; 54 Am. St. Rep. 733; McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177. If the restriction in the contract is unlimited in point of time, and is otherwise reasonable, it continues during the life of the promisor: See monographic note to Angler v. Webber, 92 Am. Dec. 755, on validity of contracts in restraint of trade.

HARRIS v. MURPHY.

[119 NORTH CAROLINA, 24.]

EVIDENCE—MODIFICATION OF WRITTEN CONTRACT BY PAROL.—The rule that parol evidence cannot be received to contradict, add to, modify, or explain a written contract does not apply where the modification is alleged to have been made subsequent to the execution of the writing. Hence, after a contract has been reduced to writing, the parties may, before a breach thereof, make a new and valid contract, not in writing, either annulling the former agreement altogether, or adding to, subtracting from, varying, or qualifying its terms.

INSTRUCTIONS—SINGLING OUT A WITNESS.—A court must not single out a witness, where the testimony is conflicting, and direct the jury to find according to his evidence; but a witness is not "singled" out, in the offensive sense of that word, where the jury is charged that, if they believe he told the truth, and that a fact is as testified to by him, they should find for the plaintiff; but, if they do not believe so, and do believe that the facts are as testified to by other witnesses, that they should then find for the defendant; and such instruction is not erroneous.

Action by the plaintiff, R. W. Harris, against Murphy, Jenkins & Co., to recover for work and labor performed. There was a judgment for the plaintiff and the defendants appealed.

Charles F. Warren, for the appellants.

W. B. Rodman and J. H. Small, for the appellee.

²⁴ MONTGOMERY, J. This action was commenced in the court of a justice of the peace to recover of the defendant an amount alleged to be due to the plaintiff for work and labor performed for the defendant in raising a sunken flat or barge filled with coal, and for other services rendered in connection therewith. The first cause of action sets out an express contract, the second declares as for a quantum meruit. The defendant denies the right of the plaintiff ³⁵ to recover on the ground that the contract was in writing and entire, and that the plaintiff has not performed his part of the same. The contract is in the following words and figures:

“Washington, N. C., September 7, 1891.

“Received of E. V. Murphy fifteen dollars, in part payment for raising barge of coal, and taking up coal from bottom of river at S. R. Fowle & Son’s wharf, and preparing the two barges for towing to Tarboro, and going and looking after them from Washington to Tarboro, the full amount being \$55 for the entire contract.
R. W. HARRIS.”

During the trial the plaintiff offered evidence tending to show that the contract had been modified after its execution to the extent of relieving the plaintiff of every obligation thereunder except that of raising the barge, and that for any services plaintiff should render after the barge was raised the defendant was to pay him two dollars per day. The defendants excepted to the introduction of this evidence on the grounds, first, that there was an express contract in writing and entire between the parties, and that the plaintiff could not recover for his services as on a quantum meruit, nor for part performance; and, further, that parol evidence could not be allowed to contradict, alter, or modify the written contract. The exception cannot be sustained. In *Meekins v. Newberry*, 101 N. C. 17, it is said: “It is a settled rule of the law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake, properly alleged, parol evidence cannot be received to contradict, add to, modify, or explain it.” And this rule was recognized before and has been affirmed in numerous cases ³⁸ since, that decision. But in all those cases the offer was to change or to modify or to alter the written contract by evidence in parol of declarations and understandings made either contemporaneous with or prior to the execution of the written contract. The rule, however, does not apply in cases like the one before the court, where the modification is alleged to have been made subsequent to the execution of the writing: *Browne on Parol Evidence*, 99; *Greenleaf on Evidence*, 303; *Swain v. Seamens*, 9 Wall. 271; *Emerson v. Slater*, 22 How. 41. In the last-cited case the court cite the case of *Goss v. Nugent*, 5 Barn. & Adol. 65, and quote from it the rule as laid down by Lord Denman: “After the agreement has been reduced into writing, it is competent to the parties in cases falling within the general rules of the common law at any time before the breach of it by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract.” One of the

witnesses, Walter Spencer, testified that after the contract in writing was entered into, while the work was going on at the wharf, Murphy (a deceased partner of the defendants) agreed that Harris should only raise the barge, and that he should be released from the balance of the contract, and that all the services that the plaintiff might render after the flat was raised should be considered extra, and that the plaintiff should receive therefor two dollars per day. Several other witnesses testified concerning the conversation between the plaintiff and Murphy, and these witnesses said that the only modification of the contract was that the plaintiff was not required to get up from the bottom of the river the coal which had slipped off the barge when it sunk. The testimony was irreconcilably contradictory. His honor instructed the jury: "Now ³⁷ if the jury should believe that the witness, Walter Spencer, told the truth, and that the contract was so modified, that they should find that the defendants are indebted to the plaintiff in the sum of forty dollars, that being the balance of the contract price; and also for any extra services after the flat was raised, at the rate of two dollars per day. The plaintiff claims that he was engaged five days in transferring the coal from the flat to the wharf, at two dollars per day; and that he was engaged five days in watching the flat, at two dollars per day. But, on the other hand, if the jury should believe that the witness, Walter Spencer, did not tell the truth, and should believe, as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then, it being admitted that the other provisions of the contract on the part of the plaintiff, viz., the preparation of the barges for towing, and going with them, and looking after them from Washington to Tarboro, had not been performed by the plaintiff, the contract being entire and indivisible, the plaintiff would not be entitled to recover."

The defendants excepted to the charge. The exception cannot be sustained. There are numerous decisions in our reports to the effect that the court cannot single out a witness or witnesses where the testimony is conflicting and charge the jury that if such witnesses have told the truth, or that if they believe those witnesses, to let their verdict be so and so: *State v. Rogers*, 93 N. C. 523; *Anderson v. Cape Fear Steamboat Co.*, 64 N. C. 399; *Weisenfield v. McLean*, 96 N. C. 248; *Jackson v. Commissioners*, 76 N. C. 282. If the instruction complained of seems

to be obnoxious to the prohibition contained in the above-named cases, it is only seemingly so and not really so. In the case before the court, the witness, Spencer, was not singled out in the ³⁸ offensive sense of that word. The attention of the jury was sharply drawn to the contradiction between the testimony of that witness and that of the other witnesses, and the jury were instructed in substance to weigh the testimony of them all. They were told that if they believed this witness, Spencer, had told the truth, and that the contract was modified as he had testified, then to find for the plaintiff; and in the same breath they were told, "But, on the other hand, if the jury should believe that the witness, Spencer, did not tell the truth, and should believe as testified by the other witnesses, that the only modification of the contract was the plaintiff was not required to get up the coal from the bottom of the river, then . . . the contract being entire and indivisible, the plaintiff would not be entitled to recover." The credibility and the character of the witness, Spencer, were no more on trial before the jury than were the credibility and character of the other witnesses. It was impossible for the jury to have been misled by this charge so as to have believed that it was his honor's opinion that more weight was to be given to Spencer's testimony than to that of the other witnesses whose testimony was in conflict with his.

The other exceptions are not sustained, and, as they are connected with and are dependent upon those already discussed, it is needless to go into them.

Affirmed.

Subsequent Parol Agreement to Vary a Writing.*

Some General Principles.—It is well understood that parol evidence is not admissible to vary or contradict a written instrument, whatever may be its form: *Fawcner v. Smith Wall Paper Co.*, 88 Iowa, 169; 45 Am. St. Rep. 230; *Crane Co. v. Specht*, 39 Neb. 123; 42 Am. St. Rep. 562; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53; 36 Am. St. Rep. 895; *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; *Bryan v. Hunt*, 4 Sneed, 543; 70 Am. Dec. 262; *Meekins v. Newberry*, 101 N. C. 17; *Hel v. Heller*, 53 Wis. 415; *Cocke v. Bailey*, 42 Miss. 81; *Black v. Wabash etc. Ry. Co.*, 111 Ill. 351; 53 Am. Rep. 628; that a party cannot, by parol evidence, add a stipulation to, or take one from, a contract already complete in all its parts: *Fawcner v. Smith Wall Paper Co.*, 88 Iowa, 169; 45 Am. St. Rep. 230; *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; *Gilbert v. Stock-*

* REFERENCE TO MONOGRAPHIC NOTES.

Alteration of contract within statute of frauds by subsequent verbal agreement: 100 Am. Dec. 169-172.

Parol evidence, when admissible to show warranty outside of contract: 5 Am. St. Rep. 197-201.

man. 76 Wis. 62; 20 Am. St. Rep. 23; Conant v. National State Bank, 121 Ind. 323; that parol evidence of a collateral or contemporaneous agreement is not admissible to add to, alter, or vary the terms of a written instrument where it is not sought to prove any additional agreement, or any consideration for the same: Middleton v. Griffith, 57 N. J. L. 442; 51 Am. St. Rep. 617; notes to Sullivan v. Lear, 11 Am. St. Rep. 394; Appeal of Cornwall etc. R. R. Co., 11 Am. St. Rep. 894; Turner v. McDonald, 9 Am. St. Rep. 192; Culver v. Wilkinson, 145 U. S. 205, 212; Johnston v. St. Louis etc. Ry. Co., 141 U. S. 602, 612; and that parol evidence is not admissible to ingraft into a writing new terms or conditions in the nature of a guaranty: Crane Co. v. Specht, 39 Neb. 123; 42 Am. St. Rep. 562; or warranty: See monographic note to Green v. Batson, 5 Am. St. Rep. 197, as to when parol evidence is admissible to show a warranty outside of a contract; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510; De Witt v. Berry, 134 U. S. 306. Parol evidence is no more admissible to contradict or vary a contract implied from a written instrument than it is to contradict or vary the express terms of such instrument: Bryan v. Duff, 12 Wash. 233; 50 Am. St. Rep. 889; Fawcner v. Smith Wall Paper Co., 88 Iowa, 169; 45 Am. St. Rep. 230; and parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract, than it is to vary its terms: Brandon Mfg. Co. v. Morse, 48 Vt. 322.

The rule excluding parol evidence tending to explain, modify, or contradict written instruments applies as well to subsequent as to prior or contemporaneous oral declarations of the parties: Mott v. Richtmyer, 57 N. Y. 49, 58. Statements and conduct of the parties subsequent to a conversation during which it is claimed that a contract was made are competent only as they tend to show the real understanding of the parties as to the transaction, and not to control, or in any way to change, the effect of the conversation: Potter v. Phenix Ins. Co., 63 Fed. Rep. 382. If, therefore, parties have, in the absence of fraud, accident, or mistake, deliberately put their contract into a writing, which is evidently complete in itself, and couched in such language as imports a legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto, and consequently all prior conversations and negotiations are deemed to be merged therein, and parol evidence of conversations held between the parties, or of declarations made by either of them, whether before or after the completion of the contract, will be rejected: Note to Green v. Batson, 5 Am. St. Rep. 197; Mott v. Richtmyer, 57 N. Y. 49, 58; Seitz v. Brewers' Refrigerating Co., 141 U. S. 510; Cocke v. Bailey, 42 Miss. 81; Michels v. Olmstead, 14 Fed. Rep. 219; Bryan v. Hunt, 4 Sneed, 543; 70 Am. Dec. 262; note to Sullivan v. Lear, 11 Am. St. Rep. 394; Hei v. Heller, 53 Wis. 415; Brown v. Russell, 165 Ind. 46; Brewster v. Potruff, 55 Mich. 129.

It is also well understood, however, that parol evidence is admissible to explain a writing: Davis v. Crookston etc. Light Co., 57 Minn. 402; 47 Am. St. Rep. 622; Aultman v. Clifford, 55 Minn. 159; 43 Am. St. Rep. 478; Helberg v. Schumann, 180 Ill. 12; 41 Am. St. Rep. 339;

Donisthorpe v. Fremont etc. R. R. Co., 30 Neb. 142; 27 Am. St. Rep. 387; Hyndman v. Hogsett, 111 Pa. St. 643; Caley v. Philadelphia etc. R. R. Co., 80 Pa. St. 363; Succession of Guillory, 29 La. Ann. 495; Arthur v. Roberts, 60 Barb. 580; Byers v. Locke, 93 Cal. 493; 27 Am. St. Rep. 212; Cooper v. Berry, 21 Ga. 526; 68 Am. Dec. 468; to make its terms definite: Katz v. Bedford, 77 Cal. 319; to fill out an incomplete contract: Aultman v. Clifford, 55 Minn. 159; 43 Am. St. Rep. 478; Hyndman v. Hogsett, 111 Pa. St. 643; Weeks v. Binns, N. Y. Supr. Ct., 1896; to apply the terms of a writing to the subject matter: Note to Marl v. Connecticut Fire Ins. Co., 51 Am. St. Rep. 107; to show the circumstances under which a contract was made: Black v. Wabash etc. Ry. Co., 111 Ill. 351; 53 Am. Rep. 628; to show whether a paper ever became a contract or not: Black v. Wabash etc. Ry. Co., 111 Ill. 351; 53 Am. Rep. 628; to prove a collateral, contemporaneous, or subsequent agreement not inconsistent with a written agreement: Note to Aultman v. Clifford, 43 Am. St. Rep. 481; Durkin v. Cobleigh, 156 Mass. 108; 32 Am. St. Rep. 436; Lanphire v. Slaughter, 61 How. Pr. 36; Dunklee v. Goodnough, 68 Vt. 113; Brock v. Sturdivant, 12 Me. 81; Steamboat Dictator v. Heath, 56 Pa. St. 290; to show that a contract never had a valid existence: Julliard v. Chaffee, 92 N. Y. 529; Bedell v. Wilder, 65 Vt. 406; 36 Am. St. Rep. 871; Jamison v. Ludlow, 3 La. Ann. 492; Perrine v. Cheeseman, 11 N. J. L. 174; 19 Am. Dec. 338; or that it is illegal, and, therefore, a nullity: Roe v. Kiser, 62 Ark. 92; 54 Am. St. Rep. 288; Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; Koehler v. Dodge, 31 Neb. 328; 28 Am. St. Rep. 518; Corbin v. Sistrunk, 19 Ala. 208; Fenwick v. Ratliff, 6 T. B. Mon. 154; Fletcher v. Decondreau, 11 La. Ann. 59; Lazzarre v. Jacques, 15 La. Ann. 599; Martin v. Clarke, 8 H. I. 389; 5 Am. Rep. 586; Russell v. De Grand, 15 Mass. 35; Black v. Wabash etc. Ry. Co., 111 Ill. 351; 53 Am. Rep. 628; Newsom v. Thighen, 30 Miss. 414; but parol evidence will not be received to show that it was agreed and understood that a writing was a sham, and designed only to deceive the creditors of one of the parties: Conner v. Carpenter, 28 Vt. 237. It may also be shown by parol evidence that a contract, not under seal, was not intended to be operative as a contract from its delivery, but only on the happening of some future contingent event, though that is not expressed by its terms: Westman v. Krumwelde, 30 Minn. 313.

The rules of evidence in regard to explaining, or varying, or contradicting written evidence, are the same in courts of equity as in courts of law. Parol evidence is not admissible either in equity or at law to vary the terms of a written contract: Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch. 392; Cooper v. Tappan, 4 Wis. 362; Wilkinson v. Wilkinson, 2 Dev. Eq. 376; Swain v. Seamens, 9 Wall. 254, 272; Stevens v. Cooper, 1 Johns. Ch. 425; 7 Am. Dec. 499.

Furthermore, the rule forbidding the introduction of parol evidence to contradict, add to, or vary a writing, has no application to stipulations or agreements made between the parties subsequent to the execution of the written instrument. Agreements not by specialty, whether written or unwritten, are of the same grade and dignity in law, and are denominated simple contracts. Hence, it follows that to admit evidence of a subsequent parol

agreement, for the purpose of showing an abandonment, discharge, or alteration of the terms of a previous written agreement not under seal, would not be to affect or dissolve the agreement by matter of an inferior nature. And, therefore, it is generally admitted that it is competent for the parties to an executory written contract not under seal, at any time before breach thereof, by a subsequent verbal agreement, founded on a sufficient consideration, either to waive altogether, or dissolve, or annul the previous written agreement, or in any manner to add to, subtract from, or vary or qualify the stipulations of such agreement, and thus to make a new or different contract, which may be proved by parol, whether it is a substitute for the old, or in addition to, or beyond it: *Bryan v. Hunt*, 4 Sneed, 543; 70 Am. Dec. 262; *Cummings v. Arnold*, 3 Met. 486; 37 Am. Dec. 155, and numerous authorities therein cited: *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346; *Heatherly v. Record*, 12 Tex. 49; *Marshall v. Baker*, 19 Me. 402; *Creamer v. Stephenson*, 15 Md. 211; *McKinstry v. Runk*, 12 N. J. Eq. 60; *Cobb v. O'Neal*, 2 Sneed, 438; *Perry v. Central Southern R. R. Co.*, 5 Cold. 138; *Flanders v. Fay*, 40 Vt. 316; *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29; *Shepherd v. Wysong*, 3 W. Va. 46; *Calliope Min. Co. v. Herzinger*, 21 Col. 482; *Wilson v. McClenny*, 32 Fla. 363; *Rigsbee v. Bowler*, 17 Ind. 167; *Loomis v. Donovan*, 17 Ind. 198; *Michels v. Olmstead*, 14 Fed. Rep. 219; *Swain v. Seamens*, 9 Wall. 254, 271; *Emerson v. Slater*, 22 How. 28, 42; *Platt v. United States*, 22 Wall. 496, 507; *Goss v. Nugent*, 5 Barn. & Adol. 58, 64; *Hubbell v. Ream*, 31 Iowa, 289; *Oregonian Ry. Co. v. Wright*, 10 Or. 162, 165; *Adler v. Friedman*, 16 Cal. 139; *Leeds v. Fassman*, 17 La. Ann. 32; *Holloway v. Frick*, 149 Pa. St. 173; *Thomas v. Barnes*, 156 Mass. 581; *Perrine v. Cheeseman*, 11 N. J. L. 174; 19 Am. Dec. 388; *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566; *McCauley v. Keller*, 130 Pa. St. 53; 17 Am. St. Rep. 758; *Bannon v. Aultman*, 80 Wis. 307; 27 Am. St. Rep. 37; *White v. Soto*, 82 Cal. 654; *Simonton v. Liverpool etc. Ins. Co.*, 51 Ga. 76, 80; *Danforth v. McIntyre*, 11 Ill. App. 417; *Morrill v. Colehour*, 82 Ill. 618; *Bowman v. Cunningham*, 78 Ill. 48; *Todd v. Allen*, 18 Kan. 543; *Cain v. Pullen*, 34 La. Ann. 511; *Courtenay v. Fuller*, 65 Me. 156; *Wiggin v. Goodwin*, 63 Me. 389; *Allen v. Sowerby*, 37 Md. 410, 420; *Mactier v. Wirgman*, 4 Har. & J. 568, 578; *Richardson v. Hooper*, 13 Pick. 446; *Kennebec Co. v. Augusta Ins. etc. Co.*, 6 Gray, 204; *Morgan v. Butterfield*, 3 Mich. 615, 623; *Hewitt v. Brown*, 21 Minn. 103; *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577; *Vastine v. Wyman*, 5 Mo. App. 598; *Juilliard v. Chaffee*, 92 N. Y. 529; *Brewster v. Countryman*, 12 Wend. 446; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; *Negley v. Jeffers*, 28 Ohio St. 100; *Guthrie v. Thompson*, 1 Or. 353; *Lauer v. Lee*, 42 Pa. St. 165, 172; *Smith v. Lilly*, 17 R. I. 119; *Hogan v. Crawford*, 31 Tex. 634; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233; *Grace v. Lynch*, 80 Wis. 166, 169; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388.

It matters not how soon after the execution of the written contract, the parol one was made. If it was, in fact, subsequent, and is otherwise unobjectionable, it may be proved and enforced: *Rogers v.*

Atkinson, 1 Ga. 12; Brewster v. Countryman, 12 Wend. 446. Either an express subsequent agreement may be shown, or actions necessarily involving an alteration: Holloway v. Frick, 149 Pa. St. 178; and the rule that parol evidence is not admissible to vary the terms of a written contract does not apply to evidence that a contract was to be made, but which does not refer to the terms of the contract: Davis' Sons v. Cochran, 71 Iowa, 369.

Assignment—Bonds.—Parol evidence is admissible, in an action by an assignee to recover a balance of account, to show that a written assignment of the claim sued upon, no assignee being named, was intended to effect an assignment to plaintiff, and that the assignor had in fact made a parol assignment to him, and that the omission of his name from the writing was unintentional: Owen v. Meade, 104 Cal. 179. A subsequent oral agreement to assign bonds is valid, and may be proved by parol: Snow v. Alley, 151 Mass. 14; though in Hancock v. Cossett, 45 Fed. Rep. 754, it was held that testimony to show that a written contract expressed in a title bond was altered by verbal agreement was inadmissible.

Carriers.—A charter party may be varied or annulled by a subsequent agreement, and this must determine the rights of the parties: Mactier v. Wirgman, 4 Har. & J. 568, 578. The legal operation of the contract contained in a bill of lading may be modified by subsequent parol agreement; as by the addition of a parol suppletory agreement that the freight shall be at the risk of the shipper; and such special agreement may be established by parol evidence: Atwell v. Miller, 11 Md. 348; 69 Am. Dec. 206. It is competent, in an action against a vendor for failure to deliver flour by a certain agreed date, for him to show that the vendee had said, after the written agreement was made, that if the tide did not rise in the river over which the flour was to be transported, it need not be delivered by that time. The effect of this evidence is a question of fact for the jury: Bryan v. Hunt, 4 Sneed, 543; 70 Am. Dec. 262. A parol agreement posterior to a written shipping contract is admissible to justify the conduct of a master in stowing freight on deck, and throwing it overboard because of tempestuous weather: Barber v. Brace, 8 Conn. 9; 8 Am. Dec. 149. If the procuring of freight is a service not contemplated in a written agreement, it may be proved by parol evidence that, immediately after the written agreement was made, the parties entered into another agreement by which one of the parties, in case he should obtain freight, was to have compensation therefor, independently of the commissions mentioned in the written agreement: Richardson v. Hooper, 13 Pick. 446. A foreign master of a vessel who changes his voyage, and promises to pay his seamen their wages at the port; if they will proceed with him, will be held to bail in a suit for wages, though the seamen have subscribed original articles, that they will not commence any suit in foreign ports, but abide by the maritime laws of a foreign country: Vibus v. Wirting, 2 Yeates, 850. If there is a written contract for the construction of a line of railroad, it is competent to prove, by oral evidence, a subsequent contract for supplying the cattle yards, a telegraph line, turntables, etc., necessary or proper for the equipment and operation of such line of

railroad when completed; and the same rule would apply as to furnishing nut fasteners and extra ties not within the terms of the original written contract: *Fitzgerald v. Fitzgerald etc. Construction Co.*, 41 Neb. 374; 44 Neb. 463.

Changing Time of Performance, etc.—Conditions.—The time of performance of a written agreement may be extended by parol, and evidence of such agreement is admissible: *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566; *Baker v. Whitesides*, Breese, 174; 12 Am. Dec. 168; *Keating v. Price*, 1 Johns. Cas. 22; 1 Am. Dec. 92, and note; *Emerson v. Slater*, 22 How. 28; *Kane v. Cortesy*, 100 N. Y. 132; *Smith v. Lilley*, 17 R. I. 119; *Hogan v. Crawford*, 31 Tex. 634; *Franklin v. Long*, 7 GilM & J. 407; *Robinson v. Batchelder*, 4 N. H. 40, 45; *Frost v. Everett*, 5 Cow. 497; *Loomis v. Donovan*, 17 Ind. 198; so, it may be established by parol that the place of performance has been changed: *Hogan v. Crawford*, 31 Tex. 634; and no new consideration is necessary, it seems, in such cases, where there are mutual acts to be performed by the parties: *Wadsworth v. Thompson*, 8 GilM. 423. See subhead "Consideration," *infra*. A subsequent parol agreement to postpone the delivery of articles under a contract without seal is not a waiver of the contract, but only an enlargement of the time for its performance: *Watkins v. Hodges*, 6 Har. & J. 38. A parol agreement to reduce the interest on a mortgage from seven to six per cent, and to pay it semi-annually instead of annually, made after the mortgage becomes due, is valid: *Sharp v. Wyckoff*, 39 N. J. Eq. 376. Parties may, after the execution of a written contract, by a further agreement, fix a place for carrying it into effect, and appoint an agent to receive the money payable thereon. Such agreement is binding upon them and may be shown by parol evidence: *Cummings v. Putnam*, 19 N. H. 569. There may also be an oral agreement which constitutes a condition on which the performance of the written agreement is to depend: *Michels v. Olmstead*, 14 Fed. Rep. 219. After time of payment is extended, no action lies upon the original contract until the expiration of that time: *Grafton Bank v. Woodward*, 5 N. H. 99; 20 Am. Dec. 566. It is held, however, that the time of performance of a contract to convey lands cannot be extended by parol; though parol enlargement of the time of performance of a written contract is valid if the contract itself would be valid if made by parol: *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; and that parol evidence is inadmissible, where part of an entire contract is within the statute of frauds, to vary the part not otherwise within the statute, by enlarging the time of performance: *Ladd v. King*, 1 R. I. 224; 51 Am. Dec. 624. See subhead "Statute of Frauds," *infra*. As to extension of time for payment of note, and changing the rate of interest, see subheads, "Consideration" and "Promissory Notes," *infra*.

Consideration.—A parol agreement made subsequent to the completion of a written contract concerning the same subject is not binding unless supported by some new and sufficient consideration; or has been so far acted upon that a refusal to carry it out would work a fraud on one of the parties: *Thurston v. Ludwig*, 6 Ohio St. 1; 67 Am. Dec. 328; *Carruthers v. McMurray*, 75 Iowa, 173; *Randolph v.*

Perry, 2 Port. 376; 27 Am. Dec. 659; Hogan v. Crawford, 31 Tex. 634; Adler v. Friedman, 16 Cal. 139; McKinsty v. Runk, 12 N. J. Eq. 66; Malone v. Dougherty, 79 Pa. St. 46, 53; Cummings v. Arnold, 3 Met. 486; 37 Am. Dec. 155; Bryan v. Hunt, 4 Sneed, 543; 70 Am. Dec. 262; Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 346. Thus, a waiver of a condition, to be operative, must be supported by an agreement founded on a valuable consideration: Ripley v. Aetna Ins. Co., 30 N. Y. 136; 86 Am. Dec. 362; though it is held in Cheshire v. Taylor, 29 Iowa, 492, and Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83, that no consideration is necessary to support a waiver. After a written contract has been broken, it cannot be shown that there was a parol modification of it, where there is no consideration to support the alleged new agreement: Wharton v. Missouri Car Foundry Co., 1 Mo. App. 577, 582. A parol agreement to accept part of a debt in satisfaction of the whole is not binding although such part payment is made, unless such agreement is made on a new consideration. There is a new consideration sufficient to support the agreement, if the part payment is made before the debt is due or in any manner more advantageous to the creditor than the payment to which he was entitled by the terms of his original contract: Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 346. A sufficient consideration exists for the agreement of an indorsee to receive payment from an indorser in the notes of a specified bank, when such indorser agrees unconditionally to make such payment out of his own funds at the maturity of the note, because the indorser's agreement changes his contingent liability to pay after due demand and notice of dishonor to an absolute liability to pay at the maturity of the note. Such agreement is not within the statute of frauds: Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 346. A subsequent oral agreement modifying an executory bilateral written contract is substituted for the contract as originally made, and, it is held in Thomas v. Barnes, 156 Mass. 581, that the original consideration attaches to, and supports, the modified contract: See, also, Stead v. Dawber, 10 Ad. & E. 57, 66; Brown v. Everhard, 52 Wis. 205. These cases show, of course, that the subsequent agreement need not rest upon any "new" consideration.

A contract between the payor and payee of a promissory note, entered into after principal and interest are due, and reciting that, in consideration of certain payments at certain times, to avoid litigation, and for other considerations, the time is to be extended to a date mentioned therein, and a pending suit on the note dismissed, is void, as being without consideration, in the absence of extrinsic allegations showing a valid consideration for the contract of forbearance; and a contract for an extension of time in which to pay a promissory note, void for want of consideration, will not release the surety thereon: Davis v. Stout, 126 Ind. 12; 22 Am. St. Rep. 565. A promise by a lessee to pay rent in advance, when the rights of the parties are already fixed by the lease, and there is nothing either of detriment to the promisee or of benefit to the promisor beyond the obligations mutually established in such lease, is nudum pactum: Hasbrouck v. Winkler, 48 N. J. L. 431.

Mutual promises, however, constitute a good consideration: Thom-

ason v. Dill, 30 Ala. 444; McNish v. Reynolds, 95 Pa. St. 483; and it is obvious that the new agreement to be enforceable, must be valid in itself, and such as may be made the basis of an action: Adler v. Friedman, 16 Cal. 139.

Employment — Services — Work.— A verbal contract of hiring, made on the same day, but subsequent to a written contract concerning the matter, may be proved by parol, where both contracts are sued on, in connection with the written contract: Strauss v. Gross, 2 Tex. Civ. App. 432. Conversations with an owner of a boat, in which he directs contract work to be done thereon in a different and more expensive manner, and agreeing to pay for it, do not impeach the written contract, and are admissible in evidence: Steamboat Dictator v. Heath, 56 Pa. St. 290. So, with painting a house: Rand v. Mather, 11 Cush. 1; 59 Am. Dec. 131. Modifications of a written contract of hiring, agreed to after its execution, may be proved by parol evidence, especially where the original contract has, by its own terms, been fully terminated: Hale v. Sheehan, 41 Neb. 102, 104.

If a contract to perform certain stipulated services, for a certain sum, is not rescinded by the mutual consent of the parties, then a promise to pay an additional sum for the same services is without consideration and cannot be enforced: Festerman v. Parker, 10 Ired. 474; Lingenfelder v. Walnwright Brewing Co., 103 Mo. 578, and authorities therein collected at page 593; King v. Duluth etc. Ry. Co., 61 Minn. 482; for an agreement to do what one is already under a legal obligation to do does not constitute a consideration for a contract: Ayres v. Chicago etc. R. R. Co., 52 Iowa, 478. But the question of consideration, as here involved, is a difficult one, and one on which courts are divided, and, if a party refuses to go on with his contract, because it is a losing one, or for any other reason, it has been held that the parties may make a new and valid parol contract concerning the work, which will be enforceable. Hence, if one abandons work, under his contract, and the other party promises to pay him more if he will go on with the work, and complete it, the oral contract is enforceable because the mutual promises constitute a sufficient consideration to make the contract binding: Munroe v. Perkins, 9 Pick. 298; 20 Am. Dec. 475; Bishop v. Busse, 69 Ill. 403; Coyner v. Lynde, 10 Ind. 282; Lawrence v. Davey, 28 Vt. 264; Rollins v. Marsh, 128 Mass. 116; Goebel v. Linn, 47 Mich. 489; 41 Am. Rep. 723; Endriss v. Belle Isle Ice Co., 49 Mich. 279; Cooke v. Murphy, 70 Ill. 96; Stewart v. Keteltas, 36 N. Y. 388; but a condition, such as a guaranty, added without consideration to a contract is not enforceable: McCarty v. Hampton Bldg. Assn., 61 Iowa, 287; Vanderbilt v. Schreyer, 91 N. Y. 892.

Insurance.—A restriction upon the face of an insurance policy, that its terms shall not be altered by any agent, does not prohibit an alteration by the company through its agent: Hibernia Ins. Co. v. Malevinsky, 6 Tex. Civ. App. 81. In the absence of any limitation upon an agent's authority, he may make an oral agreement, after the execution of a written contract of insurance, though such oral agreement is not indorsed on the policy, which will bind the insurers: Kennebec Co. v. Augusta Ins. etc. Co., 6 Gray, 204. An insured

person, by asking and accepting an extension of time, and a waiver of a forfeiture, agrees, by clear implication, to continue the risk, and to pay the premium at the day fixed, for which implied promise the extension is a good consideration. Such an extension is valid as an agreement based upon mutual promises: *Homer v. Guardian Mut. etc. Ins. Co.*, 67 N. Y. 478. A waiver of the conditions in an insurance policy, or forfeiture arising from a breach thereof, need not be founded on any new consideration, as the consideration is no element of the conditions, and they may be waived or dispensed with by an agreement without consideration: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83. See subheads, "Specialties" and "Waiver," *infra*.

Leases.—Although parties may have entered into a written lease, they may make a valid subsequent independent agreement by parol respecting the same premises: *Danforth v. McIntyre*, 11 Ill. App. 417; *Hope v. Balen*, 58 N. Y. 380. The privilege of the lessee as to improvements may be extended: *McDonald v. Stewart*, 18 La. Ann. 90. So a subsequent parol agreement by the landlord to repair, made upon a new and sufficient consideration, moving him thereto, may be proved, and the tenant may recover for the breach of such parol agreement: *Post v. Vetter*, 2 E. D. Smith, 248. The landlord's consent, by a new agreement subsequent to the lease, to the cutting of trees on the leased premises, and on adjoining premises, may be proved by parol, where the lease provided that trees should not be cut on the premises without the consent of the lessor: *Palmer v. Sanders*, 49 Fed. Rep. 144. An executed oral agreement by a lessee with his lessor to take a partner in his business for three years, and borrow money and put into the business, provided the lessor would reduce the rent already reserved, forms a good consideration for the lessor's promise to reduce the rent: *Hastings v. Lovejoy*, 140 Mass. 261; 54 Am. Rep. 462. A written lease of a hotel having been executed, parol evidence is competent to establish a contemporaneous oral agreement by the lessor, in consideration of the lease, not to engage in a rival business in the same city: *Welz v. Rhodins*, 87 Ind. 1; 44 Am. Rep. 747. It is competent to show by parol that wheat was divided, by mutual consent, in a manner not authorized by the lease: *Freese v. Arnold*, 99 Mich. 13. It is also competent to prove by parol other changes in the terms of a lease, where they have been mutually agreed upon by the parties subsequently to the execution of the instrument: *Brant v. Vincent*, 109 Mich. 426; *Flanders v. Fay*, 40 Vt. 816. See subhead "Specialties," *infra*.

Mortgages.—It is competent to show that, after the execution of a chattel mortgage, the mortgagee gave the mortgagor permission, by parol, to sell the mortgaged property: *Walker v. Camp*, 63 Iowa, 627; *Frick Co. v. Western Star etc. Co.*, 51 Kan. 370; but such evidence is inadmissible to control the construction or effect of the mortgage: *Clark v. Houghton*, 12 Gray, 38. A subsequent agreement between two chattel mortgagees as to which mortgage shall have priority may be shown: *Birkenhead v. Brown*, 47 Ill. App. 216. A mortgage of land was given to secure the purchase price of a mule, which, by agreement, was returned and a mare taken in exchange. A mort-

gage was given on the mare to secure the payment of sixty-four dollars boot. The mare was subsequently returned and the chattel mortgage canceled, it being also verbally agreed that the land mortgage should stand as security for twenty-five dollars, hire of the mule, and a store account meanwhile contracted. It was held that the land mortgage was extinguished, and could not, by parol testimony, be applied to a debt subsequently contracted: *Lindsay v. Garvin*, 31 S. O. 259.

Practice—Proof.—A court will not act on evidence of a verbal waiver of a written contract, unless it is very clear and distinct: A written agreement should not be modified or overthrown by parol without clear and satisfactory proof, but of this the jury must judge: *Bearich v. Swinehart*, 11 Pa. St. 233; 51 Am. Dec. 640; and, in all such cases, it must appear that each novation or new obligation was founded upon a good and sufficient consideration, to affect in any manner the original contract in writing: *Hogan v. Crawford*, 31 Tex. 634. An abandonment, modification, or change, of a written contract, or the substitution of a verbal one for it, may be shown by parol by proving either an express agreement, or actions necessarily involving the alteration: *Holloway v. Frick*, 149 Pa. St. 178. Such evidence is received to prove that the written contract, to which it refers, has become inoperative by reason of a subsequent and independent one: *Marshall v. Baker*, 19 Me. 402. The new verbal contract may be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what is left of the written agreement: *Goss v. Nugent*, 5 Barn. & Adol. 58, 65; *Cummings v. Arnold*, 8 Met. 486; 37 Am. Dec. 155; and it must appear that the old, written contract has been abandoned: *Adler v. Friedman*, 16 Cal. 139; *Wharton v. Missouri Car etc. Co.*, 1 Mo. App. 577, 582. Evidence of the negotiations which led up to the written agreement is admissible to show the reason for its being made as it was, and to sustain the allegation of a change when such reason ceased to exist: *Holloway v. Frick*, 149 Pa. St. 178, 180. An independent agreement between two of several parties to a contract is admissible upon a question whether there has been a modification of the original contract as tending to show that such a modification did not appear unreasonable to the parties to the independent agreement: *Palmer v. Fogg*, 35 Me. 368; 58 Am. Dec. 708. In cases of an agreement substituted in place of a prior agreement, such former agreement may be sued upon, and the defendant, to defeat a recovery, must show performance of the new contract according to the terms thereof: *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346.

Promissory Notes.—A parol agreement, based upon a sufficient consideration, to deliver up and cancel a promissory note, is binding and will be enforced: *Hubbell v. Ream*, 31 Iowa, 289. Parol evidence is admissible to prove a contract, respecting a note, such as extending the time of its payment, made long after the execution of the note: *Grace v. Lynch*, 80 Wis. 166, 169. Where the defendant executed a promissory note to the plaintiff, but at the same time, it was agreed between them, in writing,

that the defendant was not to be liable to pay the note to the plaintiff, but was in fact merely a surety for him, it was held competent for the plaintiff to show that, subsequently, for a good consideration, the parties agreed by parol to sustain the same relation to each other in connection with the note, as was imported by its terms, and, such a subsequent agreement having been proved, the plaintiff was held entitled to recover of the defendant upon the note: *Norton v. Downer*, 33 Vt. 26. Parol evidence is admissible to show an agreement that part of the property, for which a promissory note was given, might be returned if not approved of. Such evidence tends, not to vary the terms of the note, but to establish a right of setoff: *Barnes v. Shelton*, Harp. 33; 18 Am. Dec. 642.

But a promissory note cannot be converted by parol evidence from a special into a conditional contract: *Middleton v. Griffith*, 57 N. J. L. 442; 51 Am. St. Rep. 617; and if it fixes the rate of interest thereon, parol evidence has been held not admissible to show that subsequent to its execution a different rate of interest was agreed upon: *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565.

Sales.—Parol evidence is admissible to prove that a written contract of sale, as of machinery, has been added to, changed, or superseded by an oral agreement: *Bannon v. Aultman*, 80 Wis. 307; 27 Am. St. Rep. 37; *Osborne v. Stringham*, 4 S. Dak. 593; and there may be an oral modification of a contract of agency to sell: *Cortland Wagon Co. v. Sharvy*, 52 Minn. 216. In an action upon a written order for a harvester, for its price, it is competent for the defendant, where he sets up fraud in procuring his signature to the order as a defense, to show that the machine was delivered to him under an oral contract entirely different in its terms from the one sued on, for the purpose of establishing his claim that the one sued on never became operative: *Esterly v. Eppelsheimer*, 73 Iowa, 260. It is competent, also, in a written contract of sale, which is silent as to the time of delivery, to prove a subsequent oral agreement, distinct from the original contract, fixing the time of delivery, as such proof does not conflict with the rule which excludes parol evidence, enlarging or varying a written contract: *Orguerre v. Luling*, 1 Hilt. 388. See sub-head, "Statute of Frauds," *infra*.

Specialties.—At common law, a covenant or contract under seal could not be modified or waived, before breach, by a parol executory agreement: *Kaye v. Waghorn*, 1 Taunt. 428; *Preston v. Christmas*, 2 Wils. 86; *Tischler v. Kurtz*, 35 Fla. 323, 382; *Suydam v. Jones*, 10 Wend. 181, 184; 25 Am. Dec. 552; *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 798; and there are cases in this country to the same effect: *McMurphy v. Garland*, 47 N. H. 316; *Leavitt v. Stern*, 159 Ill. 526; *Alschuler v. Schiff*, 164 Ill. 298; *Delacroix v. Bulkley*, 13 Wend. 71; *Barnard v. Darling*, 11 Wend. 28; *Miller v. Hemphill*, 9 Ark. 488; *Levy v. Very*, 12 Ark. 148; *Allen v. Jaquish*, 21 Wend. 628; *Eddy v. Graves*, 23 Wend. 82; *Stuard v. Patterson*, 8 Blackf. 858; *Hume v. Taylor*, 68 Ill. 43. It has been held that parol evidence is not admissible to show that rent, under a sealed lease, is not due until after the expiration of one month from the time therein stated: *Carpenter v. Shanklin*, 7 Blackf. 308; that the terms of a submission, in writing, of mat-

ters arising under a sealed lease cannot be waived by the parties agreeing to a parol award: *French v. New*, 28 N. Y. 147; that, to effect the surrender of an existing lease by operation of law, there must be a new lease valid and effectual in law, and that an oral agreement for a term longer than a year will not, therefore, operate as a surrender of an existing written lease: *Coe v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120; that a parol agreement for a new lease of a theater for a term of six years is incompetent to prove the cancellation and surrender of a prior lease, under seal, between the parties, where the sealed lease had fourteen months to run when the attempted parol surrender was made: *Leavitt v. Stern*, 159 Ill. 526; that a parol agreement between the owners of the servient and dominant tenements will not extinguish a servitude created by deed, but that this can only be done by a writing, or by operation of law: *Erb v. Brown*, 69 Pa. St. 216.

But, on the other hand, the rule is different in equity: *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793; and there is much good authority at law in support of the proposition that the terms and conditions of a covenant or contract under seal may be discharged, released, or dispensed with, in whole, or in part, by a verbal agreement, founded upon a proper consideration: *Canal Co. v. Ray*, 101 U. S. 522; *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475; *Morrill v. Colehour*, 82 Ill. 618, 626; *Dearborn v. Cross*, 7 Cow. 48; *Lattimore v. Harsen*, 14 Johns. 330; *Wilson v. McClenny*, 32 Fla. 363; *Flynn v. McKeon v. Duer*, 203; especially where the parol agreement has been executed: *Note to McCauley v. Keller*, 17 Am. St. Rep. 763; *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475; *Allen v. Jaquish*, 21 Wend. 628; *Jenks v. Robertson*, 2 Thomp. & C. 255; *Eddy v. Graves*, 23 Wend. 82. A contract under seal may be abrogated, canceled, or surrendered by an executed parol contract, and parol evidence is admissible to show this, but the question whether a sealed instrument has been so abrogated is one of fact for a jury: *Alschuler v. Schiff*, 164 Ill. 298. A contract under seal may be annulled by a new agreement by parol followed by actual performance of the substituted agreement, whether made before or after the breach. So, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such: *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793. After breach of a sealed contract, a right of action under it may clearly be waived or released by a new parol contract: *Miller v. Hemphill*, 9 Ark. 488; *Levy v. Very*, 12 Ark. 148; *Delacroix v. Bulkley*, 13 Wend. 71; *Eddy v. Graves*, 23 Wend. 82.

Specific Performance.—If a complainant has, by parol, waived or discharged a written contract, and the defendant has, by such action, entered into obligations inconsistent with its performance, it is an equity that will bar the remedy by specific performance: *Huffman v. Hummer*, 18 N. J. Eq. 90; *Bowman v. Cunningham*, 78 Ill. 48; *Morrill v. Colehour*, 82 Ill. 618, 626; *Ong v. Campbell*, 6 Watts, 392. The defendant may prove that the contract was abandoned by a verbal agreement, and set up such rescission, in equity, to defeat an application for a specific performance: *Morrill v. Colehour*, 82 Ill. 618, 626; *Walker v. Wheatly*, 2 Humph. 118; *Tolson v. Tolson*, 10

Mo. 736; Ong v. Campbell, 6 Watts, 392; but, if nothing has taken place to make a specific performance inequitable, it may be decreed, as where the defendant has refused to comply with the subsequent new agreement: Merkle v. Wehrhelm, 32 Ill. 534; or where it is found that the old agreement was not abandoned: Robinson v. Page, 3 Russ. 114, 122.

Statute of Frauds.—The question as to whether a contract within the statute of frauds can be altered by subsequent verbal agreement is discussed in a monographic note devoted to that subject in Abell v. Munson, 100 Am. Dec. 169-172; and the conclusion there reached, that such contracts cannot afterward, as a general proposition, be affected by a new, subsequent, oral agreement is supported by the following additional authorities not there cited: Northrup v. Jackson, 13 Wend. 85; Tarver v. McNulty, 39 Pa. St. 473; Barton v. Gray, 57 Mich. 622, 634; Wilkins v. Evans, 1 Del. Ch. 156; Hasbrouck v. Tappen, 15 Johns. 200; Martin v. Clarke, 8 R. I. 389, 395; 5 Am. Rep. 586; Gordon v. Niemann, 118 N. Y. 152; Thompson v. Poor, N. Y. Supt. Ct., Feb., 1893. Thus, if one makes a written offer to sell land at a fixed price, limiting the time for its acceptance by the vendee, an oral agreement extending that time creates a new contract, not evidenced by writing, and, therefore, not enforceable: Atlee v. Bartholomew, 69 Wis. 43; 2 Am. St. Rep. 103. Parties who have made written contracts may vary them afterward as much as they please by parol, if the nature of the agreements is not such that the law requires them to be in writing; but the subsequent oral agreement must be a valid and binding agreement between the parties. The new agreement must be valid in itself, and such as may be the basis of an action. It must be based upon a sufficient consideration, and must not itself be void under the statute of frauds. If it lacks the elements of a valid contract, it is a nudum pactum, and not binding upon either party, in which case the original contract must, of course, remain intact: Barton v. Gray, 57 Mich. 622, 635; Adler v. Friedman, 16 Cal. 139; Wharton v. Missouri Car etc. Co., 1 Mo. App. 577, 582. It is obvious that a written contract, whether within the statute or not, may be changed by a new and distinct agreement; but when the writing is required to be in writing, in order to satisfy the statute, then the change must be in writing: Wharton v. Missouri Car etc. Co., 1 Mo. App. 577, 582. If the contract is in writing, though not required to be, as where the subject matter is not within the statute of frauds, it may, of course, be changed by a new subsequent agreement not in writing: Brown v. Everhard, 52 Wis. 205. But, while a contract, required by the statute of frauds to be in writing, cannot be discharged by a parol agreement, it must not be overlooked that equity will relieve where the parol agreement has been acted upon, and the condition of the parties thereby changed: Wilkins v. Evans, 1 Del. Ch. 156; and that a substituted performance agreed upon by parol, actually and fully executed by a vendor and accepted by a vendee, may be set up, also, as a defense at law in a suit on a written contract within the statute of frauds: Long v. Hartwell, 34 N. J. L. 116.

Statute of Limitations.—A parol agreement to extend the time of payment, in a written contract of loan, though such verbal agreement is made after the execution of the written contract, does not create a new or continuing contract, so as to take the original contract out of the operation of the statute of limitations: *Booth v. Hoskins*, 75 Cal. 271.

Waiver, Abandonment, or Discharge of a written contract, or a part thereof may be shown by evidence of a subsequent parol agreement: *Willey v. Hall*, 8 Iowa, 62; *Chiles v. Jones*, 3 B. Mon. 51; *Wood v. Perry*, 1 Barb. 114; *Raffensberger v. Cullison*, 28 Pa. St. 426; *Bryan v. Hunt*, 4 Sneed, 543; 70 Am. Dec. 262; *Medomak Bank v. Curtis*, 24 Me. 36; *Whitcher v. Shattuck*, 3 Allen, 319; *Parker v. Syracuse*, 31 N. Y. 376; *Hogan v. Crawford*, 31 Tex. 634; *Baker v. Whitesides*, Breese, 174; 12 Am. Dec. 168; *Juilliard v. Chaffee*, 92 N. Y. 529; *Brady v. Cassidy*, 145 N. Y. 171; *Chicago etc. R. R. Co. v. Dickson*, 143 Ill. 368; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Swain v. Seamens*, 9 Wall. 254.

Thus, it may be proved by evidence dehors the instrument that an order for the payment of money, drawn on a particular fund, has been subsequently modified, and rights under the order waived: *Parker v. Syracuse*, 31 N. Y. 376. A waiver of a condition in a deed may be proved by parol evidence: *Leathe v. Ballard*, 8 Gray, 545. A party may show that the obligation of an instrument has been discharged by the execution of a parol agreement collateral thereto, or he may set up any agreement in regard to it which makes its enforcement inequitable: *Juilliard v. Chaffee*, 92 N. Y. 529. A waiver by parol of a breach of condition, or warranty, in an insurance policy may be shown: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Insurance Co. v. Norton*, 96 U. S. 234. It has been held that conditions in an insurance policy may be waived or dispensed with by an agreement without consideration, or, at least, that there need not be any new consideration: *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83. Contra, *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362, and note.

HOLLEMAN v. HARWARD.

[119 NORTH CAROLINA, 150.]

HUSBAND AND WIFE—ACTION FOR LOSS OF WIFE'S SERVICES AND COMPANIONSHIP.—One who injures another, either in his rights, property, or reputation, is liable in damages to the extent of that injury. Hence, as a husband is entitled to the services and companionship of his wife, one who willfully joins with her in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct.

HUSBAND AND WIFE—ACTION FOR INJURY TO HIM CAUSED BY SELLING LAUDANUM TO HER.—If a druggist persistently sells opium in the form of laudanum, in large quantities, to a man's wife, without heed to the warnings and protests of her husband, who is trying to break up her habit of using the drug, which habit is just being formed, knowing that she uses it as a beverage to

the great injury of her health, and the serious impairment of her mental faculties, thus causing a loss to the husband of her companionship and services, the wrongdoer is liable to the husband, in damages, for the injuries so sustained.

Action by the plaintiff, N. Holleman, against the defendants, Harward & Hunter, for damages. The plaintiff appealed from an order sustaining defendants' demurrer.

Argo & Snow, for the appellant.

Battle & Mordecai and H. E. Norris, for the appellees.

¹⁵⁰ MONTGOMERY, J. This action was brought to recover of the defendants damages for injuries alleged to have been sustained by the plaintiff in consequence of the defendants having sold laudanum to his wife, the defendants being druggists and knowing that the plaintiff's wife was using ¹⁵¹ the same in large quantities, and as a beverage, to the injury of her health. A demurrer ~~one~~ ^{tenus}, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was sustained by his honor. The defendants had answered, denying all the material allegations of the complaint, but for the purposes of this action, the demurrer having been entered and sustained, the matters alleged in the complaint are to be taken as true. The complaint shows that the plaintiff's wife, many years before this action was brought, while suffering from some temporary illness, was forced to take preparations of opium for relief, and from this was formed the habit of taking laudanum. The plaintiff, as soon as he discovered the habit, set to work to cure or prevent it, and so informed the defendants, who lived in the same town with him, and forbade them to sell to his wife opium in any form except upon his own order, the defendants then and before having sold her the laudanum, knowing that she was addicted to the use of it as a beverage. It is further alleged in the complaint that notwithstanding these protests and orders to the contrary of the plaintiff, the defendants have almost daily, through a series of years, against the frequent protests and warnings of the plaintiff, sold to the plaintiff's wife large quantities of laudanum, which they knew she was using as a beverage; that the defendants knew that, at the times when they were selling the laudanum to the plaintiff's wife, she was using it as a beverage; that she was becoming and had become what is known as an opium-eater; that she was, through the use of the drug, wrecking her mind and body, and that the plaintiff was doing his utmost to prevent such use and to counteract the effects of the ruinous drug. The

plaintiff alleges in his complaint "that his wife, by reason of the use of the drug as a beverage, had become a mental and physical wreck, and almost deprived of moral sensibility, ¹⁵² unfitted and disqualified to attend to her household duties or to the care and nurture and direction of her children, and that by the means aforesaid, so furnished by the defendants knowingly, willfully, and unlawfully, the plaintiff has been deprived of the society of his wife, of her services in her home, and his children have suffered from neglect and want of motherly care." That the plaintiff's family consists of his wife and six children, some of them very young, and all under age. That the plaintiff himself is dependent on his daily toil for a living, and the care of his household and children is dependent upon the services and attention of his wife, and that by the sale and use of the laudanum she has become physically and mentally incapable of attending to her duties. The complaint further alleges that but for the conduct of the defendants in selling and furnishing the plaintiff's wife laudanum, the plaintiff would have been able to have counteracted the habit, which was only forming at the time the defendants began to furnish her with the said deadly drug; and his said wife, instead of being a burden from mental and physical and moral imbecility, would have been a comfort and a helpmeet.

The question then is, Can the plaintiff, upon the facts set out in the complaint, maintain an action? The action is a novel one. With the exception of the case of *Hoard v. Peck*, 56 Barb. 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English common-law courts, or in the courts of any of our states. It does not follow, however, that, because the case is new the action cannot be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon ¹⁵³ which this action can be sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by the defendants; and that the novelty of the action, together with the silence of the elementary books on the subject matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that, while in the abstract such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be

no legal liability incurred therefor. It was argued for the defendant that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense; and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law if the wife refused to discharge them.

But, notwithstanding the claim of the defendants, we think this action rests upon a principle, a principle not new, but one sound and consistent. The principle is this: "Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the rights or the reputation ¹⁵⁴ of another": Story, J., in *Dexter v. Spear*, 4 Mason, 115. And also in the third book of Blackstone's Commentaries, chapter 8, page 123, it is written: "Wherever the common law gives a right or prohibits an injury, it also gives a remedy by action." A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying mind and body, and thereby causing loss to the husband. The defendants and the wife joined in doing

acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her, after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband.

There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of ¹⁵⁵ the husband's suit being not for the public offense, but for damages, compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was willful and unlawful, and the husband's injury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.

The defendants' counsel also insisted that the selling of laudanum is a lawful business, that it is on the same footing as the sale of spirituous liquors unrestrained by the statute. It is true that there is no statutory provision in North Carolina prohibiting the sale of laudanum as a beverage or medicine, but it does not therefore follow that a sale of it under all circumstances is lawful. As is well said in *Hoard v. Peck*, 56 Barb. 202: "Its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied." It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly, no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum or intoxicating liquors to a wife in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. We have in our state (Code, sec. 1077) a statute which makes it unlawful to sell liquor in any quantity to a minor (except he is a married man), and section 1078 gives to the person injured damages therefor. But suppose we had no statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent,

in such ¹⁵⁶ quantities as to produce habitual intoxication, or to render him unfit for employment? But laudanum is well known to be a poisonous drug. As a beverage, it cannot be drunk without injury to the body, affecting the health of the physical and moral powers; and this is known to most persons of ordinary intelligence and to all druggists. The defendants knew, taking the complaint in this appeal to be true, that the plaintiff's wife did not buy the laudanum for medicine. They knew that she was buying it as a beverage; that she was violating her duty to her husband in destroying her health, and thereby rendering herself unfit as a companion for him, and to render proper service in the household. They assisted her and encouraged her, for gain, with the means of doing all this in face of his frequent protests and warnings. The habit she had formed was the direct result of the use of the drug which the defendants sold to her in such large quantities, and they knew it and persisted in it, although repeatedly warned and entreated by the husband not to do so.

His honor erred in sustaining the demurrer. It ought to have been overruled.

Error.

HUSBAND AND WIFE—ACTION FOR LOSS OF WIFE'S SERVICES AND COMPANIONSHIP.—The wife's earnings belong to the husband: Note to *Bailey v. Gardner*, 13 Am. St. Rep. 859; and he may maintain an action for the loss of her services and companionship: See monographic note to *Shaddock v. Clifton*, 94 Am. Dec. 591, on remedies for injuries to person and reputation of married women; notes to *Barnes v. Martin*, 82 Am. Dec. 678; *Rogers v. Smith*, 79 Am. Dec. 484.

HUSBAND AND WIFE—ACTION FOR WRONG TO WIFE.—Every wrongful act of a man which causes temporal loss or damage to another subjects him to an action upon the case: *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214; 49 Am. St. Rep. 366. A husband may maintain an action against an apothecary, who, without the husband's knowledge, habitually sells laudanum to the wife, knowing that she uses it to the impairment of her mind and body: Note to *Rinehart v. Bills*, 52 Am. Rep. 333.

SHEW v. CALL.

[119 NORTH CAROLINA. 450.]

MORTGAGES—MORTGAGEE AS PURCHASER AND TRUSTEE.—A mortgagee is a trustee, and is not allowed to purchase at his own sale. If he does so, he is still a trustee.

STATUTORY POWERS OF SALE GIVEN TO AN OFFICER must be strictly observed to confer title.

POWERS—EXECUTION OF DEED BY CLERK OF COURT AFTER HE IS OUT OF OFFICE.—A clerk of court has no power to execute a deed after he goes out of office. Hence, if land mortgaged to a clerk of court, as provided by statute, with power of sale, to secure a bill of costs and a fine, is sold by him under such power, a deed executed by him after he goes out of office is void.

LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE BASIS OF.—Tenancy is the result of a contract between the landlord and the tenant by which the latter admits the lessor's title, and he and his privies are estopped, while continuing in possession, to dispute such title; but it is the contract, followed by possession, that creates the estoppel; possession without the contract will not.

DEFINITIONS.—"PRIVY," in the law of landlord and tenant, means a privity in estate; a property right acquired from the lessee by contract or inheritance.

LANDLORD AND TENANT—MARRIED WOMAN AS PRIVY IN ESTATE OR TENANT.—A married woman's mere possession of land with her husband, who is the grantee's tenant, and who is in possession after the death of such grantee, the land being afterward owned by the grantee's devisee, does not make her a privy in estate under her husband, or a tenant of the devisee.

ESTOPPEL—MARRIED WOMAN.—As possession, without a lease, does not create an estoppel, a married woman is not estopped to deny the title of a grantor by the fact that she is in possession of the land with her husband, who is the grantee's tenant, where she claims no estate through, by, or under, her husband's contract, and is not a privy in estate under or through him.

MORTGAGE BY HUSBAND AND WIFE—MARSHALING SECURITIES.—If a married woman executes jointly with her husband a mortgage on land, owned in part by him and in part by her, to secure his debt, the husband's land should be first made liable and first sold, in exoneration of the wife's land.

EQUITY—CANCELLATION OF DEED—ACTION BY WIFE. If the lands of both husband and wife, mortgaged to secure his debt, have been sold and conveyed without authority of law, she alone may, without joining him, maintain an action to cancel the deed, both as to her own land and his.

Action to cancel a deed. The court below decreed that the plaintiff, Martha M. Shew, was not estopped; that the sale of the land mortgaged be set aside; that the deed executed to J. S. Call, by the ex-clerk, J. F. Somers, be canceled; and that there should be a new sale, to be made by a commissioner, one T. B. Finley. From this judgment the defendant, M. C. Call, appealed.

W. W. Barber, for the appellant.

Glenn & Manly, for the appellee.

⁴⁵¹ FURCHES, J. This case comes to this court by appeal of defendant from the judgment of the court on a case agreed, from which it appears that the plaintiff is the wife of Peyton ⁴⁵² Shew; that she was the owner in her own right of all the lands mentioned in the complaint except a tract of about thirty-nine acres, which was the husband's. That to secure a bill of costs and a fine of thirty-five dollars she joined her husband in making a mortgage to J. S. Call, clerk, to secure the payment of said fine and cost. That soon after that said Call went out of office, and J. F. Somers was qualified and inducted into office as his successor. That said Somers, as clerk, advertised said land and sold the same, when said Call became the purchaser thereof at the price of one dollar for each tract. That soon after said sale Somers was removed from said office without having made a deed for said land, but after he went out of office did make a deed to said Call for the same. That after said sale Peyton Shew, the husband of plaintiff, being in possession of said land, rented the same from said Call, and has paid him rent thereon, and is still in possession. That J. S. Call is dead, and the defendant is the owner of whatever estate he had in said land as his devisee. The complaint alleges that the land is worth one thousand dollars or more, and this is not denied in the answer. And it was so argued by plaintiff's attorney in this court, and not denied by the attorney of defendant.

The defendant contended that the sale by Somers was fair and regular; that Call, though named as mortgagee in the mortgage, and the power of sale given to him, it was as clerk, and as he had gone out of office could not execute the power; that Somers was the proper party to do so, and Call had the right to become the purchaser; and that the deed made to him by Somers after he went out of office conveyed the estate in the land to him.

But the principal question discussed and relied on by defendant was that of estoppel existing between landlord ⁴⁵³ and tenant; that the husband of the plaintiff having rented of defendant's devisor, she was estopped to deny defendant's title while still remaining in possession.

A mortgagee is a trustee, and is not allowed to purchase at his own sale: *Kornegay v. Spicer*, 76 N. C. 95. If a mortgagee purchases at his own sale, he is still a trustee: *Whitehead v. Hellen*, 76 N. C. 99.

The right to give a mortgage to secure a fine and cost is a statutory right, and the statutory provision must be observed in

its execution to make it effective. And statutory powers of sale given to an officer must be strictly observed to confer title: *Taylor v. Allen*, 67 N. C. 346. A sheriff whose term of office had expired could not execute a deed for land sold while he was in office until authorized to do so by statute: Code, sec. 1267. This statute does not extend to clerks, and they cannot exercise this power after they go out of office: *Taylor v. Allen*, 67 N. C. 346.

Mortgages with power of sale are not looked upon with disfavor as they once were. But courts of equity, or of equitable jurisdiction, will still guard the rights of the mortgagor with jealous care. And where manifest wrong and oppression are made to appear, the court will give relief: *Mosby v. Hodge*, 76 N. C. 387.

The only remaining question to be considered is the question of estoppel. It was argued by plaintiff's counsel that this being equitable relief asked by plaintiff this rule does not apply: Citing *Allen v. Griffin*, 98 N. C. 126; *Forsythe v. Bullock*, 74 N. C. 135; *Griffin v. Richardson*, 11 Ired. 439, and *Wood on Landlord and Tenant*, 486. But we do not feel called upon to decide whether this case is an exception to the general rule, so firmly established by the decisions of this state, that a tenant is estopped to deny his landlord's title, or not. But we put our judgment ~~upon~~ upon the ground that the plaintiff is not the tenant of the defendant. The case states that the husband rented and paid rent to defendant's deviser. But this does not make the plaintiff his tenant. Tenancy is the result of a contract between the landlord and the tenant, whereby, in legal contemplation, the tenant admits the title of the lessor, and will not allow him to dispute this title while he still remains in possession. And it is true that this estoppel is held to apply to privies as well as to the original lessee. But it is the contract, followed by possession, that creates the estoppel. Possession without the contract will not.

But the plaintiff is not affected by this rule. She made no contract with Call. It is not contended she did. And though she is the wife of Peyton Shew, she is no privy in estate, under or through him. She claims no estate through, by, or under his contract with Call. Privy means a privy in estate—a property right acquired from the lessee by contract or inheritance: *Bigelow on Estoppel*, 142. A may be the son of B, but this creates no estoppel, unless A takes some estate under B, either by purchase or inheritance.

We therefore hold that the plaintiff is not the tenant of the

defendant, nor is she a privy in the estate under her husband, and is not estopped to bring and prosecute this action.

There are thirty-seven acres of the land, bought at this sale by Call, that did not belong to the plaintiff, but was the estate of the husband. He is not made a party. And while the case shows the same infirmities exist as to the sale and purchase of this tract as the other, which belonged to the plaintiff, there would be no ground or authority for setting aside the deed for the husband's part but for the relation of the plaintiff and her husband, and part of the land being hers and a part being his. The debt which ⁴⁵⁵ the mortgage was given to secure was the liability of the husband. His land and that of plaintiff were both included in the mortgage to secure the husband's liability. This being so, the land of the wife (the plaintiff) in law was but security for the husband. And his lands should be first made liable and first sold in exoneration of the wife's land: *Hinton v. Greenleaf*, 113 N. C. 6; *Gore v. Townsend*, 105 N. C. 228. The lands never having been sold according to law, the sale under which defendant holds her deed being without authority of law, passed no title to defendant's devisor.

We are therefore of the opinion that the plaintiff, who has mortgaged her lands as a security for her husband's liability, has such an interest in his land as entitles her to have the defendant's deed from Somers declared void as to her husband's land as well as to her own. It was admitted that since the date of the mortgage and the lease to the husband the plaintiff has become a free trader under the statute.

The judgment of the court (inadvertently, we suppose) speaks of plaintiff's paying rent. There is nothing in the pleadings or in the facts in the case agreed that sustains this statement in the judgment, and the same will be stricken out. And the judgment of the court will be so reformed as to direct an account of any rents or profits the defendant has received from said land, giving her credit for any taxes she may have paid, and, if anything shall be found for the defendant, the same shall first be applied to the satisfaction of the judgment for which said lands were mortgaged.

After making this application, if the residue of the judgment be not paid in a reasonable time, to be determined by the court, the commissioner shall sell first, the thirty-seven acres belonging to the husband, W. P. Shew, and if it ⁴⁵⁶ brings enough to pay the residue of the judgment and the cost of sale, the lands of

plaintiff will not be sold. But in the event the tract belonging to the husband shall not bring enough to pay the balance of the judgment, etc., then the plaintiff's land, or a sufficient amount of the same, shall be sold and reported to court.

The judgment setting aside the sale of Somers and his deed to Call, amended as above directed, is affirmed.

POWERS CONFERRED BY STATUTE must be exercised in the mode prescribed: Note to Zottman v. San Francisco, 81 Am. Dec. 107.

LANDLORD AND TENANT.—THE RELATION of landlord and tenant can exist only by virtue of a contract, express or implied: Little v. Libby, 2 Greenl. 242; 11 Am. Dec. 68.

ESTOPPEL—LANDLORD AND TENANT.—The doctrine of estoppel between landlord and tenant has no application to a constructive relation, but only to the actual relation created by contract: James v. Patterson, 1 Swan, 809; 55 Am. Dec. 787.

ESTOPPEL—MARRIED WOMEN.—A married woman is not estopped from asserting title to her lands, except for fraud, and can be divested of her interest therein only in the mode prescribed by statute: Louisville etc. Ry. Co. v. Stephens, 98 Ky. 401; 49 Am. St. Rep. 803. For other cases showing that a married woman cannot be indirectly bound by estoppel, see note to Cravens v. Booth, 58 Am. Dec. 116.

ROCKY MOUNT MILLS v. WILMINGTON & WELDON RAILROAD COMPANY.

[119 NORTH CAROLINA, 693.]

ATTACHMENT—MOTION TO DISSOLVE—JURISDICTION. After a defendant enters a general appearance and files an answer, the effect thereof is the same as if process had been served personally. Hence, if, after a defendant has been brought into court on attachment process, he subsequently enters a general appearance and files an answer, a motion to dissolve the attachment, on the ground that it will not lie under the statute, is properly dismissed as immaterial, upon the question of jurisdiction, for the defendant is otherwise in court.

RAILROADS—PARTNERSHIP ASSOCIATION OF LINES—JOINT LIABILITY.—If two or more railroad companies form an association which establishes a through line for the transportation of freight, with through bills of lading, giving the names of the traffic agents of the different lines, the freight charges to be paid at the point of receipt or of delivery, and to be divided in proportion to the number of miles on each road over which the goods are carried, such companies become partners, under the name of the association, though they are still common carriers, and they and their connecting lines are jointly liable, each for the others, for damages caused by delay, or otherwise, on any part of the through line, irrespective of a provision in the bill of lading that each company shall not be liable for any damages beyond its own line.

RAILROADS—DELIVERY OF FREIGHT—DAMAGES FOR DELAY.—If one engaged in equipping a cotton factory, and having men employed under pay, ships machinery for his factory on a railroad, and the company is negligent in failing to deliver the freight

within a reasonable time, whereby the men are forced to remain idle, the measure of damages for the delay is interest on the unemployed capital, the wages paid to the men, and other damages resulting from the delay and strictly traceable to it.

Action brought by the plaintiff, the Rocky Mount Mills, against the defendants, the Wilmington & Weldon Railroad Company and the Pennsylvania Railroad Company, to recover damages for delay in the delivery of freight. The contract was a through one between the plaintiff and the Atlantic Coast Dispatch All-Rail Fast Freight Line, operating over the Pennsylvania Railroad and the Atlantic Coast Line and connections. The plaintiff alleged that the defendant roads, in connection with other lines, made a joint contract with it to ship machinery from Lowell, Massachusetts, to Rocky Mount, North Carolina; that, so far as it was concerned, it was a joint contract on the part of these different companies, making each member responsible for the carrying out of the entire contract; that the contract was to ship the machinery with remarkable dispatch; and that they failed to comply with their contract, as the freight was delivered in Lowell on February 15, 1893, and ought to have come to hand in four or five days, but was not received until March 12th, a delay of twenty-five days after the shipment, which caused the mills to stop, and thereby injured the plaintiffs in the sum of one thousand dollars. The defendants denied having made any joint contract making the roads jointly liable; and each denied any liability for damage beyond its own line; and there was a denial of the damage claimed. The court instructed the jury that the general rule of damages was such as was within the reasonable contemplation of the parties at the time the contract was made; that if defendants knew, or could have ascertained, by ordinary care, that the freight was cotton machinery, and of a kind and of a character that a delay would be likely to cause damage to the plaintiff and stop its mill, the defendants would be responsible for the damages resulting from the delay and strictly traceable to it; that they should allow interest on idle capital caused by the delay, as an element of damage, and the amount paid the hands unemployed by reason of the delayed shipment. The jury found that there was an agreement between the two defendant companies, and other associated and connecting lines of railroad, for their mutual benefit, by which was established an all rail fast through freight line from points north and east to Rocky Mount and points south, known as the "Atlantic Coast Dispatch," and by which the different members of the association be-

came agents for the others to make contracts of affreightment for through freight, binding upon the members along such lines, and over such roads as the freight should be carried, and making such roads over which freight was carried responsible for the entire obligation of the contract. The defendants excepted to the submission of this issue to the jury. The jury also found that each of the defendant roads contracted with plaintiff to ship and deliver the machinery, but wrongfully and negligently failed to comply with its contract, and that the plaintiff was damaged by the wrongful conduct of defendants in the sum of seven hundred and seventy-one dollars and sixty-six cents. Interest was allowed from March 13, 1893. There was a verdict and judgment for the plaintiff, and the defendants appealed.

John L. Bridgers, for the appellants.

Jacob Battle and Brown & Connor, for the appellee.

704 FAIRCLOTH, C. J. The defendants are duly organized companies engaged in the business of common carriers, with their several connecting lines, with all the responsibilities and immunities attaching to the business of such carriers. Whilst we do not find it necessary to enter into the vast field of authorities and decisions defining the duties and relations of such carriers among themselves and to the public, a few general principles may be stated without citing authorities.

Common carriers are required to carry freight safely over their own lines, and make prompt delivery to the nearest connecting line when the consignee lives beyond the terminus of their own line, and, when this is done, in the absence of any other agreement, their duties are performed, **705** and they are not responsible for any loss or damage, unless it occurs while the goods are in their possession and under the control of themselves or their agents and servants.

A common carrier has power to enter into contracts, and may stipulate with his customers, imposing a limitation on his common-law liability in regard to rates, distance, time and place of delivery, and the nature of the articles to be carried, whether perishable or not, unusual hazards and the like, provided always that the limitations are just and reasonable in the eye of the law, and such contracts will be enforced.

One well-settled rule of law is, that no such company can stipulate for exemption from the consequences of its own negligence or that of its agents or servants. A just regard for the rights

of individuals and public policy will not permit it. The business of transporting passengers and freight in our state is important, and for the mutual benefit of carrier and shipper, and must be conducted under reasonable regulations. The court cannot assume that either party in such business intends to contract contrary to law and such reasonable regulations as the public interests require. An instance of an unreasonable stipulation is pointed out in *Branch v. Wilmington etc. R. R. Co.*, 88 N. C. 573, where the clause in the bill of lading was that the goods will be shipped "at the convenience of the company," which was held not to protect against an unreasonable delay. The bill of lading filed in the record contains both the receipt and the contract. It is not denied that all the parties had power to enter into the contract, and the terms of the contract are not in dispute. It is agreed that the bill contains the contract. The meaning and effect of the contract on the rights of the parties are the questions presented. The defendant Pennsylvania Railroad Company was brought into court by attachment process, ⁷⁰⁰ and subsequently entered a general appearance and filed an answer to the complaint, and then moved to dismiss the attachment on the ground that an attachment would not lie under our statute. We think his honor rightly held that the motion to dismiss the attachment was immaterial, as the defendant was then otherwise in court. So that matter is out of the way. It appears that the defendant Wilmington & Weldon Railroad Company is one of several connecting lines running south and doing business under the name of the Atlantic Coast Line, and that the defendant Pennsylvania Railroad Company is a system with several lines running northeast. The machinery was received at Lowell, Massachusetts, and its destination was Rocky Mount, North Carolina, a point on the Wilmington & Weldon Railroad Company line, and that these systems connect somewhere between Lowell and Rocky Mount. The contract was between the plaintiff and the Atlantic Coast Dispatch All-Rail Fast Freight Line, operating over the Pennsylvania Railroad and the Atlantic Coast Line and connections. This agreement is signed by T. M. Emerson, Traffic Manager Atlantic Coast Line, Wilmington, North Carolina, and by Charles F. Nye, Northeastern Freight Agent, Boston, Massachusetts, and by other agents of other roads included in said systems. The machinery received was marked, consigned, and destined to the plaintiff at Rocky Mount, North Carolina.

It is not denied that the defendants collected the whole freight

at the point of delivery, and that the same is divided among the several lines in these systems in proportion to the number of miles on each road over which the goods are carried.

Upon these facts, the plaintiff argues that the defendants and their connecting roads have agreed among themselves to conduct business through their systems under the name ⁷⁰⁷ and style of the "Atlantic Coast Dispatch"; that they have so advertised to the public, and have so contracted with him, and charge higher rates as a consideration for the fast service they profess to give, and that each road which is a member of the "Coast Dispatch" line is liable for the negligence of the other roads. The defendants admit what appears in the bill and receipt and that they do business under the name and style indicated, but insist that the "Coast Dispatch" is simply the name under which the defendants have agreed to operate their business; that they are thereby a simple association for the convenience of the public and not bound for each other's negligence on the several roads, and that, in fact, it is agreed in the conditions attached to their contract that neither company shall be liable for loss or damage not occurring on its own road.

This action is for damage resulting from delay in the transportation, and not for loss or damage to the articles shipped. The plaintiff argues that there is no stipulation in the conditions against damage for delay, and that as to that matter there is no contract, and that he is remitted to his common-law right against carriers for unreasonable delay. We are not disposed to put the case upon that technical ground, as we are satisfied the parties desire the opinion of the court on the main question.

The machinery was on the road from Lowell to Rocky Mount twenty-five days, and, allowing the time claimed during inauguration week there is still sixteen or seventeen days, which is conceded to be an unusual length of time for passage between the points. So there was inexcusable delay somewhere along the line. In the view we take, however, the particular place is an immaterial matter. Upon examination and reflection, we are of opinion that the defendants and their connecting lines are jointly liable, each for ⁷⁰⁸ the others, on the contract before us, and that they are also entitled to the same immunity and privileges as if the contract had been made by the individual company sought to be charged under said contract, that is to say, that they are engaged in business as partners under the name of the "Atlantic Coast Dispatch." They are still common carriers, none

the less so because they have certain stipulations. Having jointly agreed to conduct the "All-Rail Fast Freight Line" business under the name above stated between the terminal points of their connections north and south, and having so informed the public and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business, and such character cannot be thrown aside by any declarations in the contract in relation to the consequences or liabilities attaching thereto.

The "Coast Dispatch" is one of the contracting parties, and, if it represents anybody, it must represent the defendants as two of its members. The fact that T. M. Emerson, traffic manager, is an agent of one of the defendants, and W. H. Joice, general freight agent, is an agent of the other, and so, also, of the whole list of agents at different localities, can make no difference. Why are they conducting business under the name of the "Coast Dispatch" instead of their own companies? The argument is, that they are doing so for mutual convenience. In some respects that is plain; but suppose the plaintiff should have to go to Pittsburg or other distant place to enforce his remedy. The convenience to him is not perceived. The receiving agent, Nye, at Lowell, appearing on the bill of lading as "Northeastern Freight Agent" only, we must assume he represents the "Dispatch" line, composed of defendants and others. Taking notice, as we are at liberty to do, that the numerous transportation lines in our country, connecting ⁷⁰⁰ with each other, constituting continuous lines between remote localities, are important facts in the commercial life of the country, we can readily see that if the shipper should have to go a distant state, and find as best he can the negligent party, and enforce his remedy against him there, then the expense and trouble would in many cases be ruinous. On the contrary, the carrier's remedy in a case like the present would be easy and speedy. The whole matter is this: The defendants and their associates have engaged in a public business, in the manner described, for mutual benefit and convenience, and attempted to avoid the legal consequences by adopting some fancy name and by stipulating for limitations on the liabilities incurred in the exercise of their privileges in such business. We find no case on "all-fours" with the present, but the discussions in the following cases support the principle and conclusion at which we have arrived: *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 183; *Bradford v. South Carolina R. R. Co.*, 62 Am. Dec. 411; *Clyde v.*

Hubbard, 88 Pa. St. 358; 3 Wood on Railroads, 1922; Phillips v. North Carolina R. R. Co., 78 N. C. 294, 298; Hart v. Rensselaer etc. R. R. Co., 59 Am. Dec. 447, 450, note.

The second assignment of error was, that the court should have construed the contract and not submitted it to the jury. If so, the verdict cures it, according to our view of the case. The other requests and exceptions are dependent on the view of the court on the principal question. As to damages, we think his honor instructed the jury according to the rule prescribed by this court: Foard v. Atlantic etc. R. R., 8 Jones, 235; 78 Am. Dec. 277; Roberts v. Cole, 82 N. C. 292.

Affirmed.

ATTACHMENT—JURISDICTION.—Attachment of property does not confer jurisdiction over a defendant: Note to White v. Johnson, 50 Am. St. Rep. 737; but his general appearance does, as that is equivalent to a personal service: Note to Union Pac. Ry. Co. v. De Busk, 13 Am. St. Rep. 233.

RAILROADS—PARTNERSHIP—JOINT LIABILITY.—If a common carrier gives the shipper a bill of lading stating that the goods received are to be transported by itself and connecting carriers to a certain point beyond the terminus of its line, and there delivered to a particular person, and the shipper at the same time pays, or agrees to pay, such carrier the freight charges for the whole route, this constitutes a contract for through shipment, and makes the contracting carrier liable therefor: Central R. R. Co. v. Hasselkus, 91 Ga. 382; 44 Am. St. Rep. 37. The liability of railroad companies is that of joint contractors, where several companies enter into an arrangement to carry freight over all their lines for one through fare, in solido, payable at the terminus; and each company is liable for damages caused, though not occurring on its road: Bradford v. South Carolina R. R. Co., 7 Rich. 201; 62 Am. Dec. 411; note to Hart v. Rensselaer etc. R. R. Co., 59 Am. Dec. 450. The formation of a partnership between corporations is illegal, whether they are domestic or foreign: Bishop v. American Preservers' Co., 157 Ill. 284; 48 Am. St. Rep. 317.

CARRIERS—MACHINERY—DAMAGES FOR DELAY IN DELIVERY.—The measure of damages against a railroad company for the negligence of its agent in failing to deliver a piece of machinery consigned to him with other pieces of machinery, for shipment, and by which the whole is kept idle, is compensation for the capital invested—that is, legal interest; also for any workmen thus necessarily unemployed, expenses incurred in sending for the missing machinery, and any other damages which are the direct and necessary result of such negligence: Foard v. Atlantic etc. R. R. Co., 8 Jones, 235; 78 Am. Dec. 277. Compare Priestly v. Northern etc. R. R. Co., 26 Ill. 205; 79 Am. Dec. 300.

STATE v. SOUTHERN RAILWAY COMPANY.

[1.9 NORTH CAROLINA, 814.]

INTERSTATE COMMERCE—POWER OF CONGRESS.—While Congress has power, by express enactment, to supersede all conflicting legislation upon the subject of interstate commerce, yet, until its powers are asserted, a state has the right to pass laws necessary to preserve the health and morals of its people, though their enforcement may involve some slight delay or disturbance of the transportation of goods or persons through its borders.

INTERSTATE COMMERCE—POWER OF STATES.—While a state cannot interfere with transportation into or through its territory, beyond what is absolutely necessary for its self-protection, it is authorized, in the exercise of the police power, to provide for maintaining domestic order, and for protecting the health, morals, and security of its people.

SUNDAY LAWS — CONSTITUTIONALITY OF — INTERSTATE COMMERCE.—A state statute making it a misdemeanor to run freight trains on Sunday, is not unconstitutional, where it contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any other intent than to prescribe a rule of civil conduct for people within the state, although it may affect interstate commerce, to some extent, so far as running freight trains from one state to another is concerned.

CRIMINAL LAW—RUNNING FREIGHT TRAINS ON SUNDAY—VIOLATION OF STATUTE.—If a statute makes it a misdemeanor to run a freight train after 9 o'clock on Sunday morning, it is prima facie a violation of the statute to show that such a train was run at 10:25 o'clock A. M. of that day; and, if the defense to an indictment for running a freight train on Sunday is, that it was necessary to run after the hour fixed, as the limit, by statute, in order to preserve the health, or to save the lives, of the crew, or to relieve them from severe suffering, it is incumbent on the defendant to show that the act was done under the stress of such necessity.

CRIMINAL LAW—RUNNING FREIGHT TRAINS ON SUNDAY—DEFENSE—EVIDENCE.—Upon an indictment for running a freight train on Sunday, where the defense is that it was necessary to run the train, after the hour fixed by statute, in order to relieve severe suffering, to preserve the health, and to save the lives, of the crew, evidence that water and food could not be obtained at a certain station, passed by the train, before reaching a given point, is insufficient to support such defense, where it is not shown that both food and water could not have been obtained at any other town or station passed by the train, before reaching such point.

Indictment for running a freight train on Sunday. The train was a through freight from Charlotte, North Carolina, to Danville, Virginia. It arrived at Jamestown, about ten miles from Greensboro, and had to remain there until 9:25 A. M., on Sunday morning, when it left there, arriving at Pomona at 9:57 A. M. and at Greensboro, North Carolina, at 10:25 A. M. The conductor testified that he could not remain at Jamestown during Sunday because he could not get water or coal there for the locomotive, or subsistence for the train crew. He testified that the tank at Jamestown was empty, and, on cross-examination,

that Greensboro was a preferable and more convenient place for him to stop on Sunday than Jamestown. The defendant was convicted and appealed.

F. H. Busbee, for the appellant.

Attorney general and Shepherd & Busbee, for the appellee.

§19 AVERY, J. The statute (Code, sec. 1973) under which the indictment is drawn is not unconstitutional. Although it affects interstate commerce to some extent there is nothing in its provisions which suggests a purpose on the part of the legislature to interfere with such traffic, ^{§20} or indicative of any other intent than to prescribe in the honest exercise of the police power a rule of civil conduct for persons within her territorial jurisdiction. Such a law is valid and must be obeyed unless and until Congress shall have passed some statute which supersedes that act by prescribing regulations for the running of trains on the Sabbath on all railway lines engaged in interstate commerce: *Hennington v. Georgia*, 163 U. S. 299. While the state may not interfere with transportation into or through its territory, "beyond what is absolutely necessary for its self-protection," it is authorized, in the exercise of the police power, to provide for maintaining domestic order, and for protecting the health, morals, and security of the people: *Railway Co. v. Husen*, 95 U. S. 470, 473. Congress is unquestionably empowered, whenever it may see fit to do so, to supersede by express enactment on this subject all conflicting state legislation. But, until its powers are asserted and exercised, the statute under which the indictment is drawn may be enforced and will constitute one of the many illustrations of the principle that the states have the power, at least in the absence of any action by Congress, to pass laws necessary to preserve the health and morals of their people, though their enforcement may involve some slight delay or disturbance of the transportation of goods or persons through their borders: *Morgan S. S. Co. v. Louisiana*, 118 U. S. 455, 463; *Hennington v. Georgia*, 163 U. S. 314; *Smith v. Alabama*, 124 U. S. 465, 474, 479, 482; *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569.

The statute (Code, sec. 1973) declares the running of any such train as that in question is admitted to have been, after 9 o'clock on Sunday morning, to be a misdemeanor. It is not denied that the train arrived at Greensboro at 10:25 A. M. on Sunday. The state, therefore, ^{§21} established *prima facie* the guilt of the de-

fendant. If the defense relied upon was that it was necessary to run after the hour fixed as the limit by statute in order to preserve the health or to save the lives of the crew employed on the train, or relieve them from severe suffering, it was incumbent on the defendant to show to the satisfaction of the jury that the act was done under the stress of such necessity in order to excuse it as not in violation of the spirit though in conflict with the letter of the law: *State v. Brown*, 109 N. C. 802; *State v. McBrayer*, 98 N. C. 619. The evidence is not sufficient in any aspect of it to excuse the running of the train after 9 o'clock. Admitting that it was impossible to procure water at the tank at Jamestown (though the fact shown was not that the tank could not have been filled by pumping but that it was empty) or supplies of food for the crew, non constat but that both food and water could have been obtained in sufficient quantity at any town or station on the road west of Jamestown. In fact, the testimony tends rather to show that those who directed the movements of the train had abundant reason for anticipating further delays, and ought, therefore, to have ordered it to lie over sooner. The authorities of the road ought to have been aware that in such a busy time, when so many trains were in motion, they ought, in the exercise of ordinary care, to have ordered the train to move on to the siding in time to avoid any risk of violating the law. The proof offered falls very far short of excusing the act, denounced as a violation of law, by showing that it could not have been obeyed by the exercise of due precaution without imminent risk of endangering the lives or health of the crew on board the train.

For the reasons given the judgment of the court below is affirmed.

INTERSTATE COMMERCE—CONGRESS—STATES.—The power to regulate interstate commerce is vested in Congress: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 549, on the constitutionality of state regulations of interstate commerce: *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569; but, until it acts, a state may provide for those within its borders although it may indirectly affect those without: Note to *Carton v. Illinois Cent. R. R. Co.*, 44 Am. Rep. 678; *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279; 26 Am. St. Rep. 569. State legislation which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the power of Congress: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329; note to *Bagg v. Wilmington etc. R. R. Co.*, 26 Am. St. Rep. 550. States may, therefore, in the exercise of their police power, enact laws which, though they affect commerce between the states, are not to be considered regulations of that commerce within the meaning of the constitution of the United States: *Gulf etc. Ry. Co. v. Dwyer*, 75 Tex. 575; 16 Am. St. Rep. 926.

SUNDAY LAWS—RAILROADS—INTERSTATE COMMERCE.—As a sanitary and police measure, Sunday laws are constitutional: See monographic note to *City Council v. Benjamin*, 49 Am. Dec. 621, on constitutionality of Sunday laws; *People v. Bellet*, 99 Mich. 151; 41 Am. St. Rep. 589. It has been held that a state statute forbidding the running of interstate freight trains on Sunday between sunrise and sunset is void as a regulation of, and obstruction to, interstate commerce, no matter what its professed object may be: *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 95; 29 Am. St. Rep. 706; but see dissenting opinion at page 715, showing that such laws may be supported as regulations of police. That running railway trains on Sunday is a work of necessity, see note to *Philadelphia etc. R. R. Co. v. Lehman*, 40 Am. Rep. 418.

STATE v. CODY.

[119 NORTH CAROLINA, 908.]

APPEAL—PRACTICE ON, WHERE PRISONER IS AT LARGE.—If a prisoner is convicted of a capital felony, but escapes from custody and is at large when his appeal is called for trial, the appellate court may, in its discretion, either dismiss the appeal, or hear and determine the assignments of error, or continue the case. If the prisoner does not return, after two years' indulgence, his appeal will be dismissed.

TRIAL—ORDER OF SPECIAL VENIRE.—An order for a special venire is unobjectionable where the sheriff is directed to summon only freeholders who have paid their taxes for the preceding year, who have not served on the jury within the last two years, who have no suits pending and at issue in the court, and who are not under indictment in the court.

INDICTMENT — AMENDMENT — SUBSEQUENT PLEA.—If an indictment is amended in open court, at the instance of defendant, and with his consent, and he subsequently pleads thereto and goes to trial without objection until after verdict, this action binds him, and it would be a fraud on the court if it did not.

Indictment for burglary. The defendants, Cody and another, were convicted and appealed. Before the appeal was called for trial they had escaped from custody and were at large. The case was continued from term to term, and they were still at large when the appeal was called for hearing.

J. M. Gudger, for the appellants.

Attorney general, for the appellee.

908 CLARK, J. In *State v. Anderson*, 111 N. C. 689, it is held, approving *State v. Jacobs*, 107 N. C. 772, 22 Am. St. Rep. 912, that "where a prisoner who had been convicted of a capital felony escapes from custody and is at large when his appeal is called for trial, this court may, in the exercise of a sound discretion, dismiss the appeal, or hear and determine the assign-

ments of error, or continue the case," and in that case the appeal was dismissed. In the present instance, we have heretofore pursued the latter of the three courses indicated, having continued the cause till this the fifth term. The prisoners not yet having returned after the ⁹⁰⁰ lapse of more than two years' indulgence, we now adopt the first course and dismiss the appeal. Besides, upon looking into the record we find there were only two assignments of error, neither of which is a valid objection. The first is, that when the court ordered a special venire, the judge directed the sheriff "to summons, as far as possible, only freeholders, men who had paid their taxes for the preceding year, who had not served on the jury within the last two years, who had no suits pending and at issue in the court, and who were not under indictment in the court." The order was unobjectionable, for the classes named were subject to challenge for cause, and the venire as far as possible should consist of men qualified to serve. To encumber the venire with those thus specified would simply restrict the number of *legales homines* from whom the jury was to be taken. The very object of a special venire is to get a body of men less liable to these and other causes of challenge, than would be tales jurors picked up in the courtroom.

At the instance of the defendants, and with their consent, in open court, acting under the advice of their counsel, an amendment was made in the indictment. They subsequently pleaded to the indictment and went to trial without objection, till after verdict. This action is binding on them, and it would be a fraud on the court if it was not: *McCorkle v. State*, 14 Ind. 39; *Shiff v. State*, 84 Ala. 454. We would not, however, be understood as calling in question the decisions which deny the right of the court, either of itself, or on motion of the solicitor (*State v. Sexton*, 3 Hawks, 184, 14 Am. Dec. 584), to make amendments, except in certain cases, and then only as to matters of form and not of substance: 1 Chitty on Criminal Law, 292; *Cain v. State*, 4 Blackf. 512; *Hawthorn v. State*, 56 Md. 530.

Appeal dismissed.

APPEAL—PRACTICE WHERE PRISONER IS AT LARGE.—On the appeal of an escaped prisoner, it is within the discretion of the court, in the absence of defendant and his counsel, to determine whether the exceptions shall be passed upon, the appeal dismissed, or the hearing postponed until the recapture of the defendant. It may proceed to hear and determine the case, and to enter judgment, although the prisoner has escaped and is at large, whether he is charged with a misdemeanor or a capital felony, as the court, in a criminal case has jurisdiction to review only questions of law. It

seems to be the general rule that, where a convicted prisoner takes an appeal and escapes from custody pending the appeal, it will be dismissed: *State v. Jacobs*, 107 N. C. 772; 22 Am. St. Rep. 912, and note.

INDICTMENT—AMENDMENT—PLEA.—An indictment cannot be amended without the concurrence of the grand jury by which it was found: Note to *McGuire v. State*, 72 Am. Dec. 125. A defendant who pleads to an indictment is deemed to admit its genuineness as a record: *Glitchell v. People*, 146 Ill. 175; 87 Am. St. Rep. 147.

CASES
IN THE
SUPREME COURT
OF
OHIO.

PENNSYLVANIA COMPANY v. McCANN.

[54 OHIO STATE, 10.]

NEGLIGENCE—EVIDENCE OF. POWER TO PRESCRIBE WHAT SHALL BE.—There is no doubt of the general power of the state to prescribe the rules of evidence which shall apply in judicial proceedings therein. It may, therefore, declare that the happening of an accident through a defect of the cars or appliances of a railway corporation shall be prima facie evidence of negligence on the part of the corporation, in an action brought against it by one of its employés.

EVIDENCE—CONFLICT OF LAWS.—THE RULES OF EVIDENCE IN FORCE IN A STATE are applicable to all causes tried therein, whether the cause of action arose within or without the state, and whether the parties thereto are residents or nonresidents.

CONFLICT OF LAWS.—NEGLIGENCE, PRESUMPTIONS RESPECTING, WHEN APPLIED TO ACCIDENTS HAPPENING WITHOUT THE STATE.—A statute of a state declaring that from an accident caused by a defect in a car or other appliance of a railway corporation negligence on its part may be presumed is applicable to the trial of an action brought by an employé of a railway to recover compensation for damages resulting from an accident occurring from such a defect, beyond the boundaries of the state.

Action to recover compensation for injuries received by the plaintiff while employed by the defendant as a brakeman. The only evidence of the negligence of the defendant consisted of testimony to the effect that a stirrup on one of its cars was defective, and through its defect the injury to the plaintiff resulted. The only question before the court was whether the statute referred to in the opinion was applicable to the case, the accident to the plaintiff having occurred beyond the borders of the state. The trial court determined this question in favor of the defendant, but the circuit court on appeal reversed the judgment of the trial court, and thereupon a further appeal was taken to the supreme court.

A. W. Jones and Carey & Boyle, for the plaintiff in error.

George F. Arrel, W. T. Gibson, and R. B. Murray, for the defendant in error.

¹⁶ BRADBURY, J. The only question arising upon the record of sufficient importance to be worthy of extended consideration is whether the act of the general assembly of this state, passed April 2, 1890 (87 Ohio Laws, 149), is applicable to the case or not, the injury complained of having been sustained beyond the limits of this state. It was contended in argument that the railroad upon which the plaintiff below was injured lay wholly outside the state. The record, however, discloses that the railroad company, at the time and before the accident occurred, was operating a railroad running from Youngstown, in this state, to a point within the state of Pennsylvania, and, in connection therewith, a branch, four or five miles long, on which the accident occurred, connecting the main line with certain coal mines from which it transported coal to the main line, and thence in different directions over the latter to market; and that, in the discharge of his duties as servant of the railroad company, the defendant in error passed in and out of the state of Ohio on the main line, as the exigencies of its business required.

The second section of the act in question (87 Ohio Laws, 149) prescribes the effect that shall be given to evidence which establishes a defect in the locomotive, cars, machinery, or attachments of certain railroads, in actions for injuries to its employes, caused by such defects; and declares that ¹⁷ when such defects are made to appear, the same shall be prima facie evidence of negligence.

There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy over which its legislative department necessarily has authority, limited only by the constitutional guaranties respecting due process of law, vested rights, and the inviolability of contracts: *Railway Co. v. Erick*, 51 Ohio St. 146.

In *Templeton v. Kraner*, 24 Ohio St. 554, this court held that, "under the grant of legislative power in the constitution, the general assembly has complete control over the remedies which are to be afforded to parties in the courts of this state; and if the remedies provided do not interfere with vested rights, such effect must be given them as will carry out the intent of the law-making power."

The rules of evidence pertain to the remedy, and usually are the same whether the cause of action in which they are applied arises within or without the state whose tribunal is investigating the facts in contention between the parties before it. Nor is it material in this respect whether the parties are residents or non-residents of the state. The law of evidence in its ordinary operation is no more affected by one of these considerations than by the other. No extraterritorial effect is given to a statute creating a rule of evidence by the fact that the rule is applied to the trial of a cause of action arising in another state, or to the trial of an action between parties who are nonresidents. If the tribunals of a state obtain jurisdiction of the parties and the cause, it will conduct the investigation of ¹⁸ the facts in controversy between them according to its own rules of evidence, which is, simply, to follow its own laws within its own borders. This principle was followed by the supreme court of Georgia in the case of *Richmond etc. R. R. Co. v. Mitchell*, 92 Ga. 77, an action quite similar to the one we are now considering. The court saying: "Touching the evidence requisite to make a prima facie case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this state between the parties where the action is against a railroad company for a personal injury sustained by one of its employes in consequence of the negligence of the company. . . . This was correct, although the injury sued for was sustained in the state of Alabama. The quantity or degree of evidence requisite to sustain an action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose. It belongs not to the law of rights, but to the law of remedy." The court of appeals of New York held in 1876 that "an act declaring any circumstances or any evidence, however slight, prima facie proof of a fact is valid": *Howard v. Moot*, 64 N. Y. 262. The cases that bear in some degree upon the question are so numerous that it is impracticable to cite all of them: *Hays v. Armstrong*, 7 Ohio, 248; *Parker v. Sterling*, 10 Ohio, 357; *Lewis v. McElvain*, 16 Ohio, 347; *Goshorn v. Purcell*, 11 Ohio St. 641; *Mason v. Haile*, 12 Wheat. 370; *Vanzant v. Waddel*, 2 Yerg. 260; *Von Hoffman v. Quincy*, 4 Wall. 525; *Long's Appeal*, 87 Pa. St. 114; *Rathbone v. Bradford*, 1 Ala. 312; *Holland v. Dickerson*, 41 Iowa, 367.

Doubtless, it would be competent for the general ¹⁹ assembly to limit the application of a rule of evidence created by it to

causes of action arising within the state. If, therefore, the act under consideration does so limit the rule of evidence it establishes, the courts should observe this limitation. That the act has three sections: The first section provides "that it shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate, a railroad in whole or in part within this state, to adopt or promulgate any rule" and then denounces with a penalty the violation of its provisions.

This section of the statute attempts to regulate the conduct of every railroad company or corporation that owns or operates any part of its line within this state. The general assembly has no authority over any others, and therefore could not compel their obedience to its commandments. It did, however, extend those commandments to the extreme limit of its jurisdiction—possibly beyond them—for it may be true that although the line of a railroad may extend into this state, yet the general assembly may have no authority to inflict upon it penalties on account of acts or omissions occurring elsewhere. If this be so, the courts, in construing this section, might hesitate to impute to the legislature an intent to usurp an authority it did not possess, and would not do so unless the language of the statute should be unambiguous in this respect. In terms, this section does not require the forbidden conduct to occur in this state in order to incur the penalty that it denounces therefor. The language of the section is broad enough to include acts and omissions performed or omitted in other states. This circumstance ²⁰ is important only in so far as it indicates a legislative purpose to extend the relief afforded by the act to the full extent of its authority.

The second section, in forbidding the use of defective cars and locomotives by railroad companies, refers to them as "such corporations," manifestly including every corporation owning or operating a railroad any part of which extends into this state. Here again the prohibitive language employed is broad enough to include acts or conduct occurring in other states. If it does not reach them, we are forced to conclude that this result is quite as much due to want of power as to absence of purpose.

In the subsequent clause of the second section of the act, wherein the general assembly sought to prescribe the rule of evidence, before referred to, applicable to the trial of actions in the courts of this state, brought by employes of railroad companies on account of injuries sustained by reason of defective

cars, locomotives, machinery, or attachments, it approached the question of procedure in our judicial tribunals, over which, as we have seen, the authority of the general assembly is practically supreme. This clause of the statute is purely remedial and should receive a liberal construction. The language employed by the act in this connection is consistent with a legislative purpose to extend the remedy to all actions of the character named in the act against all railroad companies, and no sufficient reason has been assigned for limiting its operation to causes of action that arose within the state. Indeed, it would be somewhat anomalous to prescribe to the courts of the state rules of evidence depending upon the questions whether the cause of action arose within or without ^{the} state; and an intent to create this distinction should not be imputed to the legislative power unless it is fairly inferable from the language it has used.

That language is as follows: "And when the fact of such defect shall be made to appear in the trial of any action in the courts of this state brought by such employé or his legal representatives against any railroad corporation for damages on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporations. This language contains nothing indicating a purpose to confine the rule of evidence it creates to causes of action that should arise in this state. On the contrary, it expressly extends the rule to "any action in the courts of this state brought by such employé against any railroad corporation." In fact, the language is comprehensive enough to apply the rule to a railroad company, in this class of actions, whether any part of its line extended into Ohio or not, and, if the courts of our state should acquire jurisdiction over the person of a railroad company whose line lay wholly without the state, no reason is perceived why the rule should not be applied.

Judgment affirmed.

JUDGES SCHAUK AND BURKETT DISSENTED, on the ground that the statute in question was by its terms applicable only to corporations owning or operating a railway in whole or in part within the state, and therefore it did not entitle the plaintiff to the benefit of the rule of evidence in his favor created by such statute, because the railway on which he received his injury was wholly outside of the state.

EVIDENCE—RULES OF—POWER OF LEGISLATURE OVER.—No one has a vested right in the rules of evidence. They pertain to the remedy, and are, therefore, subject to the control of the legislature: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447. and note.

CINCINNATI ETC. RAILROAD COMPANY v. BANK.

[54 OHIO STATE, 60.]

BANKING CHECK, ACTION BY HOLDER OF.—An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim.

ASSIGNMENT, EQUITABLE, NOT AFFECTED BY THE DRAWING OF A CHECK.—The giving of a check upon a bank is not, unless it is accepted, an assignment of the depositor's claim, and passes no title, legal or equitable, to his moneys on deposit in such bank.

Ramsey, Maxwell & Ramsey, for the plaintiff in error.

Pogue, Pottenger & Pogue, for the defendant in error.

• **SPEAR, J.** The question presented is, whether or not a payee of a bank check can maintain an action against the bank, where the latter, on presentation, refuses to pay it, the drawer having at the time a credit on the books of the bank more than sufficient to meet the check.

Questions bearing some relation to this have been considered by this court, but the precise question has not heretofore been determined.

Authority is found supporting the affirmative of this proposition. The grounds urged are not identical in all cases, nor is the reasoning wholly consistent, but the following is believed to be a fair resume of the conclusions: Because of the universal usage of banks to cash the checks drawn by a depositor, where he has sufficient unencumbered • balance standing to his credit, a duty is implied on the part of the bank to so pay, and the holder takes the check relying upon this usage. Serious injury may result to the holder by the bank's refusal to pay, for, while he may have an action against the drawer, that would prove delusive in the frequent instance of the drawer's insolvency, and the bank's wrongful action would be the real cause of the loss. The law, therefore, implies a contract on the part of the bank with its depositors to pay their checks as presented so long as the fund is sufficient, and should, for like reasons, imply a contract with whomever may become the holder of such check to pay on presentation. The check is treated as an equitable assignment pro tanto of the fund in the hands of the bank, and, by the act of presentation, the checkholder is brought in privity with the bank, his right to sue completed, and he may sue the drawer and the bank in one action, the former as drawer and the latter as an implied acceptor. He may

also sue the drawer on the check's dishonor, or the bank for money had and received.

Forcible and ingenious arguments in support of the right to maintain the action are presented by Mr. Morse, in his valuable work on Banking, by Mr. Daniels in his treatise on Negotiable Instruments, volume 2, section 1638, where the arguments pro and con are stated and ably reviewed, and by a number of decisions, some of which are the following: *Munn v. Burch*, 25 Ill. 35; *Chicago etc. Ins. Co. v. Stanford*, 28 Ill. 168; 81 Am. Dec. 270; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; 22 Am. Rep. 185 (but see opinion in *Essex County Nat. Bank v. Bank*, 7 Biss. 195); *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146; *Lester v. Given*, 8 Bush, 358; *Fogarties v. State Bank*, 12 Rich. 68 518; 78 Am. Dec. 468; *Gordon v. Muchler*, 34 La. Ann. 608; *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510.

The contrary doctrine is maintained by many text-writers and decisions. Following are some of the authorities: 2 Randolph on Commercial Paper, 280; Pomeroy's Equity Jurisprudence, sec. 1284; Van Schaack on Bank Checks, 212; *Bank v. Millard*, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Laclede Bank v. Schuler*, 120 U. S. 514; *Florence Min. Co. v. Brown*, 124 U. S. 385, 391; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Attorney General v. Continental etc. Ins. Co.*, 71 N. Y. 325; 27 Am. Rep. 55; *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433; *Carr v. National etc. Bank*, 107 Mass. 48; 9 Am. Rep. 6; *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353; *Kuhn v. Bank*, 20 Week. Not. Cas. 230; 11 Atl. Rep. 440; *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255; 50 Am. Rep. 417; *Moses v. Franklin Bank*, 34 Md. 580; *Purcell v. Allemong*, 22 Gratt. 742; *Harrison v. Wright*, 100 Ind. 538; 50 Am. Rep. 805; *Grammel v. Carmer*, 55 Mich. 201; 54 Am. Rep. 363; *Brennan v. Merchants' etc. Bank*, 62 Mich. 343; *Bush v. Foote*, 58 Miss. 5; 38 Am. Rep. 310; *Planters' Bank v. Merritt*, 7 Heisk. 177; *Pickle v. Muse*, 88 Tenn. 380; 17 Am. St. Rep. 900; *Cashman v. Harrison*, 90 Cal. 297; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16; *Satterwhite v. Melcer* (Arizona, Apr. 18, 1890), 24 Pac. Rep. 184; *Hopkins v. Forster*, L. R. 19 Eq. 74; Wald's Pollock on Contracts, 190, 204; 2 Ames' Bills and Notes, 735.

It is not doubted that, as a general proposition, there can be no cause of action upon a contract unless there is privity of con-

tract between the obligor and the party complaining. But it is urged in argument here that while the want of privity is a good objection to the action in those states which deny the right of a third party for whose benefit a contract is made to maintain an action upon it, in Ohio the objection of want of privity cannot prevail, for the reason, as held by this court in a number of ⁶⁶ cases that an agreement made on a valid consideration by one person with another to pay money to a third can be enforced by the latter in his own name, and that the third person is not named does not affect the right to enforce it. The most recent case involving this principle is that of Emmitt v. Brophy, 42 Ohio St. 82. The action was upon a bond given by Emmitt to the county commissioners in the sale of a bridge by the Scioto Bridge Company, in which Emmitt obligated himself "to pay off and liquidate all claims and demands whether in judgment or otherwise, existing against said bridge, so that the full use of said bridge may inure to the public without let or hindrance." Brophy at the time was a judgment creditor and the owner of all of the claims enumerated in the bond. Owen, J., in the opinion, after reciting the facts, observes: "These facts are strongly suggestive that it entered into the contemplation of the parties to this bond at the time of its execution that this particular lien of the plaintiff upon the bridge was to be discharged by Emmitt. Its existence was known to them, and they seem to have left nothing to conjecture. Indeed, if Brophy and Potter had been expressly named as the lienholders, it is difficult to see how this would have added to the definiteness of the bond, or made more certain the intention of the parties. This seems to be a conclusive answer to the suggestion that there is want of privity."

No one of the cases cited carries the doctrine farther than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to ⁷⁰ amounts not specified or then ascertainable, to the extent of giving to such creditors a right of action on the contract. It must be apparent, even on brief reflection, that it does not follow from these decisions that there is privity between checkholder and bank before acceptance, and that, in order to cover the case at bar, a marked extension of the doctrine must be made. Reasons urged for such extension, however plausible, do not seem sufficient.

On the contrary, strong reasons against the proposition may be

adduced; among others, this: The transaction of giving the check does not, as will be shown farther on, substitute the checkholder for the drawer. The latter may maintain an action for the breach of the contract to honor his check, and, if the holder has a similar right, the result is, that two persons may maintain separate actions upon the same instrument at the same time to recover against the same defendant as a principal debtor. The inference that the right to recover by the checkholder is denied only in the states where a right of recovery is refused to one for whose benefit a contract is made by another arises from a misapprehension of the authorities. In many states where the right of a checkholder to sue the bank is not assented to, the right of one for whose benefit a contract is made to recover upon it is recognized: See *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Coster v. Mayor*, 43 N. Y. 399; *Merriman v. Moore*, 90 Pa. St. 78; *Huyler v. Atwood*, 26 N. J. Eq. 504; *O'Neal v. Commissioners*, 27 Md. 240; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Baker*, 70 Mo. 685; *Cross v. Truesdale*, 28 Ind. 44; *Brice v. King*, ⁷¹ 1 Head, 152; *Green v. Morrison*, 5 Colo. 18.

It is insisted that the case should not turn alone on the legal idea of privity, for, under our system of procedure, it is immaterial whether the interest of the payee against the bank is legal or equitable, and that the action here may be maintained on equitable grounds. In a well-considered case (*Covert v. Rhodes*, 48 Ohio St. 66), this court held that "a bank check or draft for a part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn." The conclusion is amply sustained by the reasoning of the opinion, and no discussion is necessary. If there is no equitable assignment of the debt pro tanto, how can equitable considerations prevail? The proceeding is not an equitable one; and if it were, we do not understand that equity has different rules from those of law with respect to the rights and obligations of parties to negotiable paper. As applicable to such case we believe that reason, and the great preponderance of authority, establish the following conclusions: The relations of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and cestui que trust. The bank agrees with its depositor to receive his deposits, to account with him for the amount, to repay to him on

demand, and to honor his checks to the amount of his credit when the checks are presented; and for any breach of that agreement the bank is liable to an action by him. The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes ⁷² the consideration for the bank's promise to the depositor. The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim; it passes no title, legal or equitable, to the holder in the moneys previously deposited, nor does it create a lien on the fund, for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted. If accepted, then the agreement is to pay according to the terms of the check or acceptance; but until then the payee looks exclusively to the drawer. He can maintain no action against the bank, for the bank owes to the payee no legal duty, and an action at law cannot be maintained except there is shown to have been a failure in the performance of legal duty. Being liable to the drawer to account with him for failure to honor his check, the bank cannot, either on legal or equitable considerations, be held at the same time liable to the holder of the check.

Tested by these rules, the plaintiff could have no cause of action against the bank, and the superior court committed no error in the judgment rendered.

Judgment affirmed.

CHECKS—ACTIONS ON BY PAYEE.—The holder of a check on a bank can maintain an action for the amount specified therein against the bank before it is accepted or certified as good by the bank, if the drawer of the check has funds deposited in the bank to an amount sufficient to meet it when presented for payment: *Simmons Hardware Co. v. Bank*, 41 S. C. 177; 44 Am. St. Rep. 700. Where a bank depositor draws a check for a portion of his deposit in favor of a third person, and, upon presentation, payment is refused, the holder may recover of the bank the amount of the check: *Fogarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468, and note; *Chicago etc. Ins. Co. v. Stanford*, 28 Ill. 168; 81 Am. Dec. 270; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146. See, also, the extended note to *New Hope etc. Bridge Co. v. Perry*, 52 Am. Dec. 449.

CHECK AS ASSIGNMENT OF FUND.—A check drawn by a depositor on the bank, unless it has been accepted, does not constitute an assignment so as to vest the fund or credit against which it is drawn, nor any part thereof, in the payee or holder: *Bank v.*

Windisch-Mulhauser Brewing Co., 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. A check drawn on a bank is not an equitable assignment: *Akin v. Jones*, 98 Tenn. 858; 42 Am. St. Rep. 921. See, especially, the extended note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 669.

NEWMAN v. KING.

[54 OHIO STATE, 23.]

PROMISSORY NOTE, ALTERATION OF.—If, after the execution of a promissory note, the date is changed by the payee one day only, without the authority of the maker, the identity of the instrument is destroyed, and no recovery can be had thereon.

NEGOTIABLE INSTRUMENT, ALTERATION AFFECTS INNOCENT PURCHASER.—If a negotiable instrument is altered after its execution by the payee, without the consent of the maker, it is thereby rendered void, even in the hands of a subsequent bona fide holder.

NEGOTIABLE INSTRUMENTS—ALTERATION OF TO CONFORM TO THE INTENTION OF THE PAYEE.—If the payee of a negotiable instrument alters it in a material respect after its execution, without the consent of the maker, a recovery cannot be sustained on such instrument on the ground that, as altered, it conforms to the original intention of the parties.

Action by the indorsee of a promissory note against the makers thereof. The judgment of the trial court was in favor of the defendants, but it was reversed on appeal to the court of common pleas. Thereupon a further appeal was taken to the supreme court.

E. M. Stanbery and Tannachill & Lyne, for the plaintiffs in error.

McElhiney & Danford, for the defendant in error.

MR. BRADBURY, J. The promissory note, the subject of this action, was executed by Ida Newman, Martha Martin, and George Martin, and delivered to the payee, J. C. Frampton. By successive indorsements, made in due course of business and before due, the note was transferred to defendant in error, Charles J. King, for value.

The makers of the note answered, contesting, among other defenses, its validity, on the ground that the payee, after its delivery to him, and without their consent and knowledge, altered its date from June 22, 1890, to June 23, 1890. This was denied by the holder of the note, defendant in error, in his reply. Upon the issue thus arising, and after the testimony bearing thereon had been given to the jury, the holder of the note, defendant in error,

requested the court to charge the jury as follows:

"If the jury find from the evidence that J. C. Frampton did alter the date of this note from ²⁷⁷ June 22, 1890, to June 23, 1890, and further find that such alteration was only for the purpose of making the note bear its true date, and that such alteration did in fact make such note bear its true date, then such alteration is an immaterial alteration, and is not a good defense in this action," but the court refused to so charge as requested, to which refusal the plaintiff at the time excepted.

Thereupon the court charged the jury upon this point as follows: "Now I say to you as matter of law in this case, gentlemen, that if you shall find from the evidence in this case that since the defendants signed the note sued upon in this action, the same has been altered by the payee thereof, J. C. Frampton, without the knowledge or consent of either of these defendants, by changing the date thereof from June 22, to June 23, that such alteration and change would, in law, amount to and would be a material alteration, and such alteration would render the note void as to these defendants, and would operate to discharge them from all liability thereon, although you may believe from the evidence that the plaintiff took the note in the regular course of business before due, for a valuable consideration, and without notice of such alteration." To which charge as given the plaintiff at the time excepted.

The verdict and judgment were against the validity of the note. This judgment the circuit court reversed, on the ground, among others, that the court of common pleas erred in refusing to charge the proposition requested, and in charging as it did upon the subject. This is the only question arising on the record of sufficient importance to require attention. That the date borne by a promissory note is a material matter is not seriously ²⁷⁸ contested. That it is material we think clear upon both reason and authority; the time of payment and the bar of the statute of limitations both depend upon its date. If the date of a promissory note may be changed one day, why not two days? If two days are not material, what number shall be held material? No satisfactory answer can be made. By changing its date the identity of the instrument is destroyed, and it is no longer the contract made by the parties: *Bowers v. Jewell*, 2 N. H. 543; *Wood v. Steele*, 6 Wall. 80; *English v. Breneman*, 5 Ark. 377; 41 Am. Dec. 96; *Miller v. Gilleland*, 19 Pa. St. 119; *Brown v. Straw*, 6 Neb. 536; 29 Am. Rep. 369.

The authorities bearing upon this proposition are quite numerous, but to cite them further would be a work of supererogation.

If, by reason of the alteration, it has ceased to be the contract of the parties, the defense thus arising is available against an innocent purchaser: *Charlton v. Reed*, 61 Iowa, 166; 47 Am. Rep. 808; *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127; *Haskell v. Champion*, 30 Mo. 136; *Wood v. Steele*, 6 Wall. 80. Other authorities could be cited, but we do not think it at all necessary to support, by an extended list of precedents, a proposition so obviously consistent with sound reason.

The defendant in error contends that, although the date which a promissory note bears may be a material matter, yet that as the note in controversy, according to the intention of all the parties to it, should have been dated June 23, instead of June 22, 1890, an alteration made by the payee honestly and in good faith after its delivery to him, that merely caused the instrument to express the date intended, even if done without the knowledge or consent of the makers, would not render ²⁷⁹ the note void. This contention finds support from reputable authorities. In *Duker v. Franz*, 7 Bush, 273, 3 Am. Rep. 314, a promissory note had been dated in 1868, and the payee altered the date to 1869 by changing the figure "8" to "9" without the knowledge or consent of the maker. The court maintained the validity of the note on the ground that in its altered condition it conformed to the intention of the parties. The same doctrine is maintained in *Mississippi: McRaven v. Crisler*, 53 Miss. 542; in *Maine: Hervey v. Harvey*, 15 Me. 357. In the latter case, however, great weight was given to the fact that the maker knew of the mistake, while the other parties did not, and the court seemed to be of opinion that his attempt to avail himself of the alteration as a defense constituted a fraud upon the plaintiff: *Hervey v. Harvey*, 15 Me. 359; *Clute v. Small*, 17 Wend. 238; *Bowers v. Jewell*, 2 N. H. 543. Other cases cited as sustaining this doctrine do not support it to the extent claimed for them.

Thus, in *Johnson v. Johnson*, 66 Mich. 525, which was an action to charge the estate of the principal maker of a promissory note for the debt evidenced thereby, a note had been given on October 23, 1876, for the balance due on account stated between the parties, but by mistake was dated October 23, 1875. The trial court found that the payee honestly, and with no fraudulent intent, changed the "5" to a "6." This was done without

the knowledge or consent of the makers. Afterward, the principal made two payments on the note, upon which circumstances some stress was placed by the court, although it does not appear that he knew of the alteration when the payments were made. The wife of Johnson had signed the note as surety. The court seemed to be of opinion ²⁸⁰ that the alteration changed the contract and discharged the wife, for the court said "the fact that Mrs. Johnson was not bound by the note would not discharge her husband, for whom she signed as surety." The claim was allowed against the estate of the principal. The reasoning of the court is not very clearly set forth, but sufficient appears to show that the decision was quite as much due to the theory that the original consideration, the account stated, would support the claim as to any other principle, the court saying: "And furthermore the account stated, which was the foundation of the note, would form a new basis of indebtedness."

In some cases, the alteration was sustained on the ground that it was made by an agent of the maker, or drawer, before delivery: *Brett v. Pecard, Ryan & M.* 37; *Van Brunt v. Eoff*, 35 Barb. 501. In other cases, the note or bill of exchange was held valid, notwithstanding the insertion of a word without the knowledge of the maker or drawer, upon the ground that the word inserted was implied by the contents of the instrument.

The question raised by the instructions given and refused relate solely to the effect to be given to a promissory note after its date has been altered by the payee without the knowledge or consent of the maker.

The question is one of public policy. Doubtless, all minds will concur in the proposition that after a written instrument has been altered in a material matter, it no longer retains its identity; it is, in fact, a new contract, and imposes obligations and secures rights different from those it imposed or secured at its origin. Nor will any reasonable ²⁸¹ mind contend that one of the parties to a written instrument may alter it without the consent of the others so that it will express anything not intended by the parties. The contention is, however, that it may be altered by one party alone without the knowledge or consent of the others, if, in its altered condition, it conforms to the intention of the parties, and the alteration was honestly made; and that that being true, it may be enforced in its altered condition. The reasoning is, that as in its changed condition it expresses the intention of the parties, no injury has been done by the alteration. That,

no doubt, is true in every case of an alteration in so far as it concerns the parties affected by it. If, in its altered state, it requires the obligor to do the particular thing he agreed to do, no personal wrong has been inflicted on him. In this view of the matter, the number and extent of the alterations are immaterial, for however great and numerous they may happen to be, the instrument in its changed condition requires the obligor to do just what he promised, and therefore, in good conscience, ought to do. The question, however, does not rest solely upon this aspect of the matter. Regard should be had to the policy of maintaining the integrity of written instruments; particularly those whose character, or nature, is such that their possession and custody belong to one party only.

Promissory notes are of this class. This policy, we think, denies to the custodian of a written instrument, to whose possession its nature necessarily confides it, the power to alter its terms in any material matter whatever, in order that it may conform to his notion of what the parties intended when it was executed.

²⁸² Deliberate tampering with written instruments by their obligees upon any pretense whatever should not be encouraged. If the right to do so in respect to any material matter should be established, the principles by which satisfactory limits can be fixed to such right are not apparent. And if established, the nature of the right is such that probably it would be rarely exercised by the prudent and conscientious custodian of a written instrument in any case; but instead it would be used chiefly, if not altogether, by those at whose hands its exercise would be fraught with peril to the integrity of written instruments, namely, those who, if not actually unscrupulous, are at least regardless of the rights of others.

Where, by mistake, a written instrument does not conform to the intention of the parties, and they cannot agree respecting the mistake and its correction, an adequate remedy has been provided, according to the principles of equity jurisprudence, by courts having jurisdiction to correct such mistakes where rules of evidence appropriate to establish the fact of mistake are prescribed and enforced.

In this state, an alteration appearing on the face of a promissory note is presumed to have been made at or before the time of its execution, and the burden of proof is cast upon one who seeks to establish the contrary: *Franklin v. Baker*, 48 Ohio St.

erty, it is a continuing, executory contract; and if such after-acquired property is delivered by the mortgagor to the mortgagee, he thereby acquires a valid lien thereon. The rule is the same where the mortgagee takes possession without the consent of the mortgagor, but pursuant to a right reserved by the mortgage.

MORTGAGE OF CHATTELS, WHEN AUTHORIZES THE TAKING OF POSSESSION OF AFTER-ACQUIRED PROPERTY. A mortgage of a stock of merchandise and also of such articles as shall be subsequently acquired as a part of such stock, and which authorizes the mortgagee to take possession in certain contingencies of the mortgaged property, authorizes the taking possession by him of subsequently acquired property. A mortgage of chattels, authorizing the mortgagee to take possession of the property when he deems it necessary for his better security, gives him the right to take such possession whenever, in his judgment, it is best for him to do so; and the rightful exercise of that authority does not depend on his having reasonable grounds of deeming it necessary for his security.

E. P. Hatfield, for the plaintiffs in error.

Hart & Canfield, for the defendants in error.

309 WILLIAMS, C. J. The record shows that William R. Ryan, the defendant in error, sold a stock of drugs and merchandise, consisting of such articles as are usually kept in a retail drug store, to Eugene Louselle, who gave Ryan a mortgage on the property to secure the payment of three notes, maturing at different dates, and which were given by the mortgagor for the purchase price of the goods. The mortgage, which was duly executed, verified, and filed with the proper officer, contained the following stipulation: "It is hereby understood that whatever portions of said stock that may be sold in general trade, that the goods purchased by the said grantor shall replace those that were so sold in general trade, and that this mortgage shall be a lien on same. To have and to hold all and singular the goods, chattels, and property above granted, bargained, and sold, or intended to be granted, bargained, and sold, unto the said grantee, his heirs and assigns." It contained the further stipulation that if default should be made in the payment of either of the notes, or if, before such default, the mortgagee should "deem it necessary for his more complete and perfect security, he is hereby authorized and empowered to enter the store or other place where the goods may be, and take and carry away said mortgaged property, and sell and dispose of the same at public or private sale, and out of the money arising therefrom to retain and pay the mortgage debt, and all charges touching the same, together with a sufficient sum to indemnify the mortgagee for any damages sustained by him by reason of any of the covenants of the mortgagor, rendering

the overplus, if any, to the mortgagor." After the execution and filing of the mortgage, the mortgagor, who retained possession of the stock ^{and} of goods included in the mortgage, sold at retail therefrom, and from time to time added to the stock other goods purchased to supply the place of those sold; and he thus continued in possession, carrying on the business, until the last mortgage note matured, when the mortgagee, after calling several times to see the mortgagor and failing to find him, and becoming apprehensive of his security, took possession of the mortgaged property, including the property purchased to supply the place of what had been sold by the mortgagor. When that had been done, and while the mortgagee was so in possession, the plaintiff in error, Francisco, who was a constable, levied an attachment on the property issued against the mortgagor at the suit of the other plaintiffs in error, who were creditors of the mortgagor, and took the property into his custody under the writ. Thereupon Ryan brought the action below to replevin the goods, obtained their possession, sold the same, and applied the proceeds to the payment of the mortgage indebtedness. The attaching creditors, who were made parties to that action, set up their claims, controverted the right of the mortgagee to the property, and prayed judgment accordingly. At the trial, the plaintiff requested the court to charge the jury that the "plaintiff had the right to seize said property under his mortgage, and if the jury found that he did possess himself of the same before defendant's attachments, their verdict should be for the plaintiff." The defendants requested as an instruction that the mortgage "was, as a matter of law, fraudulent and void as to the defendants, and that neither as to goods subject to sale in being and possessed by Louselle at the date of said mortgage, nor as to renewals of or additions to the same did ^{the} plaintiff, under his said mortgage, have the right to seize the same; and that unless they found that Louselle delivered said goods to plaintiff or assented to his taking possession thereof in some way other than signing said mortgage, the verdict should be for the defendants for the amount of their claim." Neither instruction was given, but, as the record discloses, the court "not being prepared to charge upon said propositions, by consent a juror is withdrawn, the jury discharged, and the matter in controversy submitted to the court. On consideration whereof the court finds for the plaintiff and assesses his damages at five cents"; and judgment was rendered for the plaintiff, which the circuit court affirmed.

The arguments of counsel for the respective parties here are directed to the support of the proposition embraced in the instruction which was requested in behalf of the parties they represent.

The attaching creditors were not seeking to reach any surplus remaining after the application of the proceeds of the mortgaged property to the payment of the mortgage debt; it does not appear that there was any surplus; nor were they attempting to reclaim property which had been sold to the mortgagor while he was in possession, or subject such property to the payment of their claim. The contention is confined to the sufficiency of the mortgage and the possession taken under it to create a valid lien as against the claim of the plaintiffs in error. The alleged infirmities of the mortgage are: 1. That it gave the mortgagor power to sell in the usual course of business while in possession of the mortgaged property, and is therefore void; 2. That it was ineffectual to create any lien on that part of the property which was acquired ³¹² by the mortgagor after the execution of the mortgage, and the mortgagee's possession, though taken prior to the levy of the attachment, did not cure the defect, because it was not delivered by, nor obtained with the consent of, the mortgagor; and 3. That it conferred no authority on the mortgagee to take possession of such after-acquired property.

1. A diversity of opinion has been expressed and is entertained in regard to the effect of a power of sale reserved to a mortgagor of chattel property who remains in possession of the same.

It is said by Campbell, J., in *Gay v. Bidwell*, 7 Mich. 519, 525, that "no court has given any satisfactory reason why such a provision should necessarily vitiate a chattel mortgage, although it is undoubtedly liable to abuse. The recording law enables a vigilant person to ascertain the existence of such securities. Many small merchants, especially beginners in the business, have no other means of securing their creditors for the stock they purchase, and can only meet their debts out of current sales. If any creditor is likely to be injured by allowing the debtor to dispose of the mortgaged property, it is rather the creditor whose security is thus cut down than the one who has no claim on the specific property. To hold that a merchant cannot mortgage his goods without closing his doors would be to hold that no mortgage of a merchant's stock can be made at all." And in a late case, *Etheridge v. Sperry*, 139 U. S. 266, it is said by Mr. Justice Brewer, speaking of a power of sale by a mortgagor of chattels

in possession, that: "If this were an open question, we could not be blind to the fact that the tendency of this commercial age is ⁸¹³ toward increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith"; that, "the interests of the general public are not prejudiced by any such transaction between debtor and creditor"; and that, if the question were "a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith."

It was held by this court, in *Collins v. Myers*, 16 Ohio, 547, that: "A mortgage of personal property, where the mortgagor retains possession of the property mortgaged, with the power of sale, is void as against subsequent purchasers and execution creditors." At least, in the syllabus such is declared to be the holding, and the opinion seems to warrant that conclusion; from which it may be inferred that such a mortgage is valid as between the parties, and as against creditors of the mortgagor until seized on process issued at their suit. In the subsequent case of *Brown v. Webb*, 20 Ohio, 389, it is decided that while such a mortgage, with possession and a power of sale in the mortgagor, is void as against subsequent purchasers from the mortgagor, yet, "when possession is taken by the mortgagee, the mortgage becomes valid, so as to protect the mortgaged property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor." Possession so taken by the mortgagee has the effect of completing his title, and relieving the property from liability to seizure at the suit of the mortgagor's creditors. That rule has not been qualified or questioned in any subsequent case, but is rather confirmed by that of *Webb v. Brown*, 3 Ohio St. 246, where it is said by Warden, J., that "the doctrine ⁸¹⁴ which is to be collected from authority and reason seems to be that a sale of goods, made with intent to defraud the vendor's creditors, is absolutely void, only against the legal process of the creditor"; and that "the utmost concession allowed by law to the interests of creditors leaves it still certain that until seizure by a creditor's writ, the fraudulent vendee can do with the property all that the vendor might have done had he retained the goods." Before such seizure it is competent for the debtor, in good faith, and for value, to sell and deliver the property to anyone who is willing to purchase it, or transfer the same to a creditor in payment of or security for a bona fide debt; and, when so transferred, it is beyond the reach of the other creditors of

the mortgagor; and it cannot be material in this respect whether the transfer is the result of an agreement made at the time, or is in performance of a previous agreement binding on the parties. And, as some doubt appears to be entertained in regard to the proper scope of the rule, especially in a case like the one before us, we now hold that a mortgage given in good faith, on a stock of merchandise, to secure a bona fide debt of the mortgagor, is valid as between the parties, although the mortgagor be permitted to continue in possession of the property with the power to sell therefrom in the usual course of business; and, while such a mortgage is invalid as against the creditors of the mortgagor who cause the property to be seized on legal process while it remains in his possession, and purchasers who become such during that time, when the mortgagee takes the possession of the property, either with the consent of the mortgagor given at the time, or in pursuance of a stipulation of the mortgage authorizing it, his title ^{§ 15} becomes complete and the property is no longer subject to legal process issued against the mortgagor, nor liable for his debts except to the extent of any surplus remaining after the satisfaction of the mortgage debt and proper charges resulting from its enforcement. That the mortgage involved in this case was made in good faith, to secure a debt justly owing to the mortgagee, is not questioned; and, it appears that he had taken possession of the mortgaged property before the constable levied the attachment thereon, and was in actual possession when the levy was made; so that he was entitled to hold the property as against the claim of the attaching creditor, so far as his right could be affected by the question now under consideration.

2. The mortgage in question, as has before been noticed, contains a provision to the effect that it shall be a lien on any goods that the mortgagor should add to the stock to supply the place of those sold in the course of his business; and it appears that some articles so added constituted part of the stock when the mortgagee took possession of the same; and, as to those articles, it is contended the mortgage created no lien, and the mortgagee's possession gave him no right to them; and, further, that because they were so commingled with the balance of the stock as to be indistinguishable and inseparable, his possession of all the property was illegal, and it was, therefore, liable to be taken under the attachment which was levied on it.

Courts have differed in regard to the effect of mortgages intended to create a lien on goods which the mortgagor did not

own at the time of its execution, but which it was contemplated he would thereafter acquire. This difference has arisen ²¹⁶ chiefly from the nature of the jurisdiction exercised by the courts. Those of equitable cognizance, applying the maxim that equity regards that as done which ought to be done, hold that under such a mortgage a lien attaches to the property as soon as it comes to the mortgagor's ownership; while at law it has been held that it creates no present lien, nor one as the property is acquired, but, as between the parties, it operates only as a contract for a lien, which may be made effectual for the benefit of the mortgagee by possession lawfully obtained of the property, not only as against the mortgagor himself, but also as against any subsequent legal process issued against him, or disposition attempted to be made by him. Whether, or in what instance, in actions under a civil code like ours, by which the two systems of remedial justice are blended and administered in the same courts, and often in the same proceeding, the equitable rule should be applied, is a question upon which the courts are not agreed, and one whose decision is not necessary in this case. In the case of *Chapman v. Weimer*, 4 Ohio St. 481, the court followed the rule at law, holding that: "A chattel mortgage, purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, creates no lien on the subsequently acquired property"; but, "when such mortgage authorizes the mortgagee to take possession of the property secured and attempted to be secured, it is a continuing executory contract; and when the mortgagor acquires such property after the execution of the mortgage, and actually delivers the same to the mortgagee, the latter thereby acquires a valid lien on such subsequently acquired property."

²¹⁷ The contention of the plaintiffs in error on this point is, that it is essential to the acquisition of a valid lien on the after-acquired property under such a mortgage that the mortgagor voluntarily deliver the property to the mortgagee, or give his consent to the mortgagee's possession when taken; and that the lien does not arise if, as in this case, the mortgagee of his own accord take the possession. In the case just referred to, there was an actual delivery of the subsequently acquired property by the mortgagor to the mortgagee, and the court in the decision confines itself strictly to the case made. But the principle upon which that decision rests is, that the mortgage constitutes a valid and binding contract between the parties; and, being so, it must

be given effect according to the intention of the parties as that may be ascertained from its terms. The mortgage being a valid contract for a lien, founded on a valuable and sufficient consideration, a stipulation therein authorizing the mortgagee to take possession of the property cannot be regarded as a mere license revocable at the pleasure of the mortgagor, nor as an offer to contract merely which may be withdrawn at any time before it is accepted; but is a completed contract already obligatory upon the parties, and which continues to be so until it is fully executed; so that, in taking possession of the after-acquired property in pursuance of its provisions, the mortgagee exercises a right belonging to him under the mortgage, which is something more than the naked permission or consent of the mortgagor to the act. Acting under this contractual authority in obtaining the possession of the property, the consent of the mortgagor thereto at the time can neither be necessary to ^{§18} the legality of the possession, nor can it in any way add to the rights of the mortgagee. Certainly, after possession so taken, the mortgagor could not successfully assert any claim to the property, for his contract would prevent him; and, as whatever title he theretofore had to the property is thereby extinguished, nothing remains to be reached by his attaching or other creditors, unless it be such surplus as should remain after satisfying the mortgagee's debt.

This appears to be the established law elsewhere. In *Congreve v. Everett*, 10 Ex. 298, a farmer gave a mortgage on the crops then on his farm, and such crops as might from time to time be found thereon, agreeing the mortgagee might take possession; and a year or more afterward he took possession of the crops then growing on the farm. Shortly afterward, a creditor of the mortgagor levied an execution upon the crops and sold them. In a trial at law brought by the mortgagee for the value of the property, it was held he was entitled to recover. Parke, B., in giving judgment said: "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title nor equitable title, to any specific goods; but when executed—not fully and entirely, but only to the extent of taking possession of the growing crops—it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops." That decision has since been followed by the English courts. And it is maintained by a long line of American cases that it is immaterial whether the mortgagee takes possession in

invitum, ³¹⁹ or the mortgagor voluntarily puts him in possession, if the possession be taken under an authority contained in the mortgage. In either case, the mortgagee obtains possession under a valid contract which entitles him to hold the property as against any subsequent process at the suit of the mortgagor's creditors. Among the many cases so holding are *Chase v. Denny*, 130 Mass. 566, where it is said that "if the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien, by the operation of the provision of the mortgage in regard to it"; and that the executory agreement of the owner, in such case, is a continuing agreement, so that "when the creditor does take possession under it, he acts lawfully under the agreement of one having the disposing power, and this makes the lien good": And see *Moody v. Wright*, 13 Met. 17; 46 Am. Dec. 706; *Keating v. Hannenkamp*, 100 Mo. 161; *Barton v. Sitlington*, 128 Mo. 164; *Tennis v. Midkiff*, 55 Ill. App. 642; *O'Neil v. Patterson*, 52 Ill. App. 26; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644.

3. It is further claimed that the mortgage involved in this case did not authorize the mortgagee to take possession of the property which was purchased by the mortgagor to supply the place of that sold by him, the authority being to take possession of the "mortgaged property," which, it is contended, does not include that so purchased. As has been noticed, however, the mortgage purports to create a lien on the property so purchased by the mortgagor, as well as on the stock owned by him when it was executed, and it was evidently intended by the parties to have that effect. It is but a reasonable interpretation of the instrument, therefore, ³²⁰ looking to all its provisions, that by the phrase "mortgaged property" in the subsequent clause, the parties meant all property which they intended and agreed should be covered by the mortgage. That interpretation is necessary to give full effect to all its parts, and accomplish the manifest purpose and intention of the parties.

The seizure clause in chattel mortgages is inserted for the benefit and protection of the mortgagee; and when, like the one in this case, it authorizes him to take the property when he deems it necessary for his better security, he may take it whenever, in his judgment, it is best for him to do so; and the rightful exercise of that authority does not depend upon the fact that he has reasonable grounds for deeming it necessary for his se-

curity. As said in *Werner v. Bergman*, 28 Kan. 60, 64, 42 Am. Rep. 152, "if the mortgagor wishes to retain possession of the property until the mortgagee shall have reasonable grounds to deem himself insecure, he can insert, or have inserted, a stipulation to that effect in the mortgage; or if he wishes to go still further, and retain possession of the property until the mortgagee shall become in fact insecure, he can have a stipulation put in the mortgage to that effect. But if he chooses only to have inserted in the mortgage a clause that he shall have the right to the possession of the property until the mortgagee deems himself insecure, then he can only retain the property until the mortgagee does, in fact, deem himself insecure; and he has no right to question the grounds upon which the mortgagee entertains such feeling of insecurity."

Finding no error in the record, the judgment is affirmed.

CHATTEL MORTGAGES—RIGHT OF MORTGAGOR TO MAKE SALES.—A mortgage of a stock of goods, under which the mortgagor is permitted, by agreement in or out of the mortgage but executed at the same time, to sell the goods at discretion or in the usual course of trade, without any agreement to account for the proceeds, is fraudulent and void as to the existing creditors of the mortgagor without regard to the intent of the parties to the mortgage: *Eckman v. Mannerlyn*, 32 Fla. 367; 37 Am. St. Rep. 109, and note. See, also, the note to *Richardson v. Jones*, 54 Am. St. Rep. 597, and the extended note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917.

CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY.—No lien on after-acquired goods is created by a provision in a mortgage of a stock of goods that all stock replaced after the sale of any of the stock shall be substituted for the stock originally covered thereby: *First Nat. Bank v. Lindenstruth*, 79 Md. 136; 47 Am. St. Rep. 366, and note. At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage and actually or potentially belonging to the mortgagor: *Borden v. Croak*, 131 Ill. 68; 19 Am. St. Rep. 23, and note. See, also, the extended note to *Gregg v. Sanford*, 76 Am. Dec. 727.

HOSLER v. BEARD.

(54 OHIO STATE, 898.)

INSANITY IS USUALLY A BAR TO AN ACTION upon an executory contract if existing when it was entered into.

INSANITY, BURDEN OF PROVING.—Plaintiff suing upon a negotiable instrument or other contract made by an insane person must assume the burden of proving that it was given for necessities, or during a lucid interval, or while the insane person was apparently of sound mind and not known to be otherwise, and for property purchased by him under a fair and bona fide contract, and which he has received and fully enjoyed, so that the parties can no longer be put in statu quo.

INSANE PERSON, CONSIDERATION FOR CONTRACT OF—PRESUMPTION.—No matter what is the form of the contract of an insane person, it cannot impose on him the burden of proving want of consideration.

INSANE PERSONS—NEGOTIABLE INSTRUMENTS.—The purchaser of a negotiable instrument executed by an insane person is chargeable with knowledge of his insanity, and stands in no better a position than the original payee who took the paper with knowledge of the incapacity of the maker.

PAPER NEGOTIABLE IN form made by persons non compos mentis, infants, or married women is not within the rule which prohibits a bona fide holder of a negotiable instrument received before it becomes due from defenses which the maker might have made against the payee.

Action by the indorsee of a promissory note against George Beard and the guardian of his estate. The note was negotiable in form, and had been made payable to Aaron Glathart. The payee had been intimately acquainted with the maker of the note for many years prior to its execution, and knew his condition during that time. After the note had been offered and received in evidence, no further testimony was introduced by either of the parties other than that showing the incapacity of the maker of the note at the time of its execution and the knowledge of the original payee of his condition. The trial court gave judgment for the plaintiff, but, upon appeal to the circuit court, it was there reversed, and an appeal was at once taken from the judgment of reversal to the supreme court.

Dodge & Canary, for the plaintiffs in error.

Parker & Moore, for the defendants in error.

400 WILLIAMS, C. J. In support of the judgment rendered by the trial court, it must be presumed that the evidence offered by the plaintiff was sufficient ⁴⁰¹ to establish the facts it tended to prove; and so regarding them, and giving those admitted by the parties their proper effect, the material facts which that court had before it, as shown by the record were, that the defendant, when he signed the note in suit, was an idiot incapable of understanding or making any valid contract, which was then known to the payee, and he has since continued in that condition; but that the plaintiff acquired the note for value, before its maturity, and without knowledge of the maker's incapacity; and the question presented is, Was the plaintiff, upon that state of facts, entitled to recover on the note; neither party having given any evidence tending to show whether any consideration was or was not paid or given for it, or received by the maker?

It is contended in behalf of the plaintiff that the note, notwithstanding the admitted incapacity of the maker to contract, imports a consideration, which imposed the burden on him of showing a want of consideration in order to defeat a recovery on it; while, on the other hand, it is claimed that before any recovery could be had on such a note, if an action could be maintained upon it at all, it was incumbent on the holder to prove a meritorious consideration which was received by the maker, and which alone could give rise to any liability upon it, against his estate. There appears to have been a time in the earlier history of the English law when the contracts of persons non compos mentis were enforced like those of persons who were competent to contract, it being held that a party should not be allowed to stultify himself by alleging his own incapacity; but that doctrine was so repugnant to justice and common sense that it was not long adhered ⁴⁰² to, and now finds no support anywhere. On the contrary, the rule is now established, both in England and this country, that the contracts of persons non compos mentis are not binding on them either in law or equity; and that rule rests upon the elementary principle that to the making of a valid contract the consent of the contracting parties is essential; their minds must meet and agree upon the terms and consideration of the contract, and where there is not capacity to understand or agree there can be no contract. Many authors and courts have declared the executory contracts and promises of such persons to be utterly void: Edwards on Bills, 63; Byles on Bills, 150. In Story on Promissory Notes, it is said: "Every contract presupposes that it is founded on the free and voluntary consent of the parties, upon a valuable consideration, and after a deliberate knowledge of its character and obligation. Neither of these predicaments can properly belong to a lunatic, an idiot, or other person non compos mentis. Hence, it is a rule, not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void." And it is held that it can make no difference in this respect that the party dealing with such person was ignorant of his incapacity, for if he have no contracting capacity, the fact that it was unknown to the other party cannot deprive him of his right to be protected against his misfortune. As stated by Tenterden, C. J., in *Sentance v. Poole*, 3 Car. & P. 1, 1827: "It is a hard case either way, but it is very important that courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians." It has accord-

ingly been held that a note signed by a lunatic is void as against him in the hands of every holder, ⁴⁰³ however innocent: *Seaver v. Phelps*, 11 Pick. 304; 22 Am. Dec. 372; *Van Patton v. Beals*, 46 Iowa, 62; 1 *Parsons on Bills and Notes*, 149.

Other authorities maintain that the notes and other contracts of such nonsane persons are voidable only, like those of infants, and may become valid by ratification when their infirmity is removed, as may those of infants by an act affirming them after arriving at full age. But as such contracts remain invalid until so ratified, it is not of much practical importance whether they be treated as void, or voidable in the sense indicated. Not only in this respect, but in others also, are the contracts of infants similar in their effect to those of persons laboring under mental incapacity. Thus, to the general rule that their contracts are invalid, an exception obtains applicable alike to those of both classes of persons, where the contract is for necessities actually furnished them. Those exceptional contracts are held valid, at least to the extent of the value of the necessities actually furnished. In *Byles on Bills*, in a note to page 64, it is said that "the executed contracts of a non compos mentis for necessities stand on the same footing as infants' contracts for necessities." In *Maxwell on Code Pleading*, 448, 449, the law on this subject is accurately stated as follows: "The executed contracts of a person non compos are very much like those of infants, and when necessities suitable to his station in life have been furnished, and the transaction is fair, and no undue advantage taken, he will be liable for the value of the goods."

To the general rule that the notes and other contracts of a nonsane person are invalid and will not be enforced, another exception has been made, analogous to that relating to necessities; or, it might, ⁴⁰⁴ with propriety be said that exception has been enlarged and extended to embrace cases where the note has been obtained or contract entered into in good faith, in ignorance of his want of capacity to contract, and for a full and adequate consideration of money paid or property delivered to him, or other sufficient consideration actually received by him, so that, in such cases, the contract cannot be avoided by him or his representative without restoring the consideration so received. This doctrine is not universally accepted, but is, we think, sustained by the weight of authority, and seems fair and reasonable, with the qualifications and limitations prescribed for the protection of those who are deprived of the requisite capacity to enter into

a valid agreement; the remedy against them in such cases being based not so much upon the contract as upon the benefit actually received by them.

In *Matthiessen v. McMahon*, 38 N. J. L. 536, it is held that: "The general rule is, that contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic for a full consideration, which has been executed without knowledge of the insanity, or such information as would lead a prudent person to the belief of the incapacity, will be sustained." The true scope of the doctrine is stated in the opinion of the court in that case, where, after stating that contracts for necessities constituted an exception to the general rule that lunatics were not liable on their contracts, the court says: "Other contracts with lunatics not strictly for necessities, which have been fully executed, and on which a consideration of benefit to the lunatic has been given, may be within the reason of this exception, where the transaction is shown to be ⁴⁰⁵ perfectly fair and reasonable, at least so far as to allow the recovery back of the consideration given, or prevent a rescission by the lunatic or his representative without restoring the consideration whenever a restoration is practicable. The liability of the lunatic in such cases is upheld, not on the ground of the contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract." And in *Yanger v. Skinner*, 14 N. J. Eq. 389, it is said by Chancellor Green "that if the proof be clear that an executory contract to purchase was made in good faith, and for a fair price, when the lunacy of the vendor was neither known nor suspected, and that the contract was executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, the contract will be upheld." In the case of *Loomis v. Spencer*, 2 Paige, 158, it is said by Chancellor Walworth that: "There is no doubt of the propriety of the courts refusing to enforce executory contracts entered into by a lunatic or infant; and probably no recovery could be had in either case in a court of law. The courts proceed upon the ground that neither has legal capacity to contract; although a contract of purchase made by either, except for necessities, could not be enforced, yet a court of equity ought not to interfere where the infant or lunatic has actually had the benefit of the property, if the contract was made in good faith, without knowledge of the incapacity, and where no advantage has been taken of the situation of the party." And it is held in *Young v.*

Stevens, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202, that: "As a general rule, insanity may be pleaded, or given in evidence, in bar to an action founded either upon an executory or executed contract"; but "where a person, ⁴⁰⁶ apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is beneficial to the purchaser, and otherwise fair and bona fide, and which has been fully completed, paid for, and enjoyed, and cannot be restored so as to put the parties in statu quo, such contract will not afterward be set aside either by the lunatic or his representatives." This doctrine is maintained by many cases, among them the following: Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541; Scanlan v. Cobb, 85 Ill. 296; Physio-Medical College v. Wilkinson, 108 Ind. 315, 320; Gribben v. Maxwell, 34 Kan. 8; 55 Am. Rep. 233; Burnham v. Kidwell, 113 Ill. 425; Alexander v. Haskins, 68 Iowa, 73; Riggan v. Green, 80 N. C. 236, 239; 30 Am. Rep. 77; Lancaster etc. Bank v. Moore, 78 Pa. St. 407; 21 Am. Rep. 24.

We are not aware of any authority which has extended the liability of infants or insane persons on their contracts, beyond those for necessities actually furnished them, and those falling within the doctrine of the cases referred to, where a full and adequate consideration of value was actually paid or delivered, in good faith, and without knowledge of their incapacity; and it is obvious that, to the maintenance of an action on a contract of the latter class, something more is required than where it is sought to recover on a contract for necessities; that is, not only must there have been a full and adequate consideration paid, but the transaction must have been a fair and reasonable one, made in good faith by the plaintiff, without knowledge of the defendant's want of capacity to contract.

It is well settled that in all actions upon notes or contracts claimed to have been made for necessities furnished to an infant or insane person, the burden is upon the plaintiff to prove they were ⁴⁰⁷ furnished to the amount or value of the note. He may allege that the defendant was a person of one of the classes named when the contract was made, and that it was for such necessities, and, when the latter allegation is denied, it is incumbent on him to prove it; or, if he declare on the note or contract generally, without disclosing the incapacity of the defendant, it is a complete bar to plead the defendant's incapacity at the time of the making of the contract; to overcome which the plaintiff may reply that it was made for such necessities, and

must support his reply by the necessary proof. In *Edwards on Promissory Notes*, 63, this rule is stated as follows: "When the action is upon a note given by an infant, it is barred by the plea that it was given by an infant, and, unless the plaintiff proceeds then to show that the note was given for necessities, his action fails." So, in *1 Parsons on Notes and Bills*, 150, it is said that, "to defeat a promissory note, it is only necessary to prove a condition of mind which makes self-protection impossible." In *Byles on Bills*, page 61, note, the rule is thus stated: "Infancy is prima facie a good defense to a suit on a note, and, as the holder must in answer prove the consideration to be necessities, that throws open the whole question for the benefit of the infant." And in *Maxwell on Code Pleading*, 449, it is declared that: "Insanity is generally a bar to an action on an executory contract." On page 448, the same author says: "In pleading infancy, it may be alleged in the answer that at the time of making the contract set forth in the petition the defendant was under the age of twenty-one years. If the consideration for the contract was necessities, or the defendant had ratified the contract by a new promise after he became of age, ⁴⁰⁸ these facts may be stated in the reply. In those states where no reply is required, the necessary facts, such as ratification, necessities, etc., must be stated in the petition, and, in any case where the infancy appears from the facts stated, additional facts must be pleaded which show that infancy is no defense." And, in pleading the defense of insanity, it is sufficient to allege "that at the time of entering into the alleged contract the defendant was of unsound mind, and incapable of understanding the same or entering into a contract." A similar practice obtained before the code: *3 Swan's Practice and Precedents*, 694-696; *Wilcox's Ohio Forms and Practice*, 129.

The reasons for placing the onus on the plaintiff of overcoming, by proper proof, the defense of infancy or insanity, when pleaded to an action on a contract for necessities, require that the plaintiff take the like burden in all actions on contracts of persons under those disabilities, when the defense is interposed; for it is as complete a defense in actions on contracts, other than those for necessities, as in actions brought on contracts for necessities; and it is just as essential that it be overcome by proper evidence in the one case as in the other before the plaintiff can recover. And such appears to be the established rule. It is laid down in *Bailey on Onus Probandi and Preparation for*

Trials, 144, 145, as follows: "The creditor may show in reply to proof of insanity that the contract was for necessities, even if a note be given therefor. So the creditor may, taking the burden, reply to evidence of insanity that the contract was made during a lucid interval, or, in reply to the defense of insanity, it may be shown that such insane person, being apparently of sound mind, ⁴⁰⁹ and not known to be otherwise, entered into the contract for the purchase of property which is fair and bona fide, and which is executed and completed, and the property, the subject matter of the contract, has been fully enjoyed and cannot be restored so as to put the parties in statu quo." It would seem therefore, that no contract of a person non compos mentis, in whatever form it may be put, whether in that of a promissory note or otherwise, can, on account of his want of capacity to make a valid execution of it, so import a consideration as to cast upon him the burden of proving a want of consideration, in an action brought upon it, or dispense with proof of an adequate consideration to support it as against him or his representative. The difference in that respect between such a note or contract, and one obtained from a person of weak understanding merely, is obvious, and need not be pointed out here.

In the argument of counsel for the plaintiff in error, some stress appears to be placed upon the fact that when the note in suit was signed by Beard, he was doing business in his own name. The nature or extent of that business is not disclosed. The fact could only be material as tending to prove he was sane, and therefore competent to execute the note, and can be of no importance in that respect in the face of the admitted fact that he was insane and not competent to execute it, and that was known to the payee at the time; nor is it important as affecting the plaintiff's relation to the note, in view of the admission that it was transferred to him before maturity, for value, and without notice of the maker's incapacity to execute it. If such a note so received was protected in the hands of the plaintiff against defenses ⁴¹⁰ which the maker might have against the payee at the time of the transfer, it was of no consequence whether the maker was doing any business at the time of its execution, or was not; and it is equally immaterial if it is not so protected; for upon the admitted fact that he was insane and known to the payee to be so when the note was signed, his defense was complete against the latter, and therefore equally so against the plaintiff, notwithstanding he was doing business in his own name when he signed

the note. The material question then is, whether that rule of commercial law which protects negotiable paper in the hands of a bona fide holder who has acquired it before its maturity, for value, is applicable to such paper signed by persons who at the time were non compos mentis, where there had been no ratification of it; and that it is not is well settled. Such paper being invalid, except to the extent that it is founded upon a consideration of necessities, or other valuable consideration actually furnished, an action, disassociated from such consideration, cannot be maintained upon it, when the incapacity of the maker is shown; and the quality of negotiability does not attach to it, though made negotiable in form; and every holder of such paper is chargeable in law with notice of the status of the maker as it existed at the time of its execution, and stands, therefore, in no better position, so far as his right of action against the maker is concerned, than the payee from whom he obtained it; and a want of actual knowledge, when he received the note, of the maker's mental condition when it was signed, makes no difference in that respect. So far as we have been able to discover, the authorities ⁴¹¹ uniformly maintain that the paper of persons non compos, infants, and feme covert at common law, all resting upon much the same principle, is not within the commercial rule which protects a bona fide holder of a negotiable note, received before it became due, from the defenses which the maker might have made against the payee; and that in defense to such paper in the hands of such a holder the maker's incapacity to execute it may be shown. In *McClain v. Davis*, 77 Ind. 419, it is held that: "A promissory note, payable in bank, given upon an unexecuted consideration to one who knew of the maker's disability, though it has passed into the hands of an innocent purchaser, may be disaffirmed," and that "the purchaser of such paper takes it with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind." In the opinion the court say: "Commercial paper is not an exception to the rule which permits a disaffirmance by anyone who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind": *Parsons on Notes and Bills*, 149, 150; *Edwards on Bills*, 63, 69.

In the case of *Moore v. Hershey*, 90 Pa. St. 196, it appeared that Moore, when insane, but before he was adjudged to be so,

signed a negotiable note, which was indorsed by the payee to Hershey before due, and for value, and without any knowledge of Moore's insanity. In an action brought by Hershey on the note, Moore's incapacity to make it was set up as a defense, and as the report states, at the trial, the plaintiff having proven the signature ⁴¹² to the note and put the same in evidence, and proven the consideration paid for it, rested. Judgment having been recovered by the plaintiff, the case was taken on error to the supreme court, one of the errors assigned being that the trial court declined to instruct the jury that it was "incumbent on the plaintiff to show that the defendant, a lunatic, received value for the note in suit, and, there being no such proof, the defendant was not bound by the note." The judgment was reversed. In the opinion, the court, after referring to the decision of a former case, *Lancaster etc. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24, and declaring it to be "a just rule," as there enforced, that "where a lunatic obtains the property of another person who in good faith deals with him in ignorance of his lunacy, he shall not keep both the property and the price," and that "the most that has been decided is, that when a man deals fairly with a lunatic, and without knowledge of his lunacy, he is entitled to recover the value of what he honestly parted with," say they place their decision in the case then before them upon the broad ground that the principle of commercial law which protects negotiable paper in the hands of a bona fide holder "does not apply to the case of commercial paper made by mad-men"; and, "on the contrary, the true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration." The rule thus ⁴¹³ announced is approved in the subsequent case of *Wireback v. First Nat. Bank*, 87 Pa. St. 543, 39 Am. Rep. 821, where it is held: "The holder of an insane person's note is in no better position than the payee." Judge Sharswood, in his note to the seventh edition of *Byles on Bills*, pages 61, 62, states the rule with clearness and accuracy as follows: "It seems very clear that when the security is of such a nature that by the rule of law the consideration cannot be inquired into, then the infant is not

liable. In the hands of the payee, however, it may be inquired into, and it would seem necessarily in the hands of the indorsee. Infancy is *prima facie* a good defense, and, as the holder must in answer prove the consideration to be necessities, that throws open the whole question for the benefit of the infant"; and, further, that "on proof that the maker is an infant, the negotiability of the note is at an end, but it does not cease to be a note. It may be sued on by the holder in his own name. He stands in the shoes of the original payee, and can recover whatever he would have been entitled to recover." "The holder, at most, must be subrogated to the rights of the original payee in an action in the name of the payee on a declaration founded on the original consideration": And see Tiedeman on Commercial Paper, sec. 48. Further reference to authorities on that subject would be unprofitable here, since counsel for the plaintiff concede that the paper of insane persons, though negotiable in form, is not negotiable within the commercial rule. But they seek to make that rule so far applicable as to protect such paper in the hands of an innocent holder against all defenses except fraud or want of consideration. Our attention has been called to no such qualified rule of the law merchant as protects negotiable ⁴¹⁴ paper in the hands of a bona fide holder against some defenses, growing out of the transaction, which the maker might interpose in a suit brought against him by the payee, and lets in others; and we know of none. The paper of an insane person, however perfect in form it may be, not having the quality of negotiability within the rule of the law merchant, by reason of the incapacity of the maker, and the holder occupying no better position with respect to it than the original payee, the plea of insanity at the time of the execution is as available and has the same effect as a defense in a suit by the holder as if the suit were by the payee. In each case, it avoids the note and defeats a recovery, unless the plaintiff is able to show it was given for necessities, or that the maker otherwise received an adequate consideration for it, in a transaction that was fair and reasonable on the part of the payee, and without knowledge by him of the maker's mental condition. That requirement is not met nor dispensed with by the fact that the holder paid value to the payee for the transfer of the note; that is necessary to the protection of the holder of negotiable paper under the commercial rule. As said in the case of *Wireback v. First Nat. Bank*, 39 Am. Rep. 821: "If the fact that the holder had paid value were enough, the lunatic could

not defend for fraud or want of consideration; then an innocent holder could recover, though the judgment would sweep away the lunatic's estate, and had not been benefited a farthing." Upon the case made in the trial court, as shown by the record, we think the plaintiff was not entitled to recover, and the circuit court committed no error in reversing the judgment rendered in his favor, and remanding the cause for a new trial.

Judgment affirmed.

INSANE PERSONS—VALIDITY OF CONTRACTS OF.—Lunatics or insane persons are incapable, for want of capacity, to enter into a valid contract or to do any valid act: *Helberg v. Schuman*, 150 Ill. 12; 41 Am. St. Rep. 339, and note. See, also, the note to *Williams v. Hays*, 42 Am. St. Rep. 753, and the extended note to *Jackson v. King*, 15 Am. Dec. 861-869.

SAMMIS v. SLY.

[54 OHIO STATE, 511.]

A TECHNICAL CONVERSION DOES NOT CHANGE THE TITLE to the property until the owner elects that it shall do so, and if it is destroyed before such election, without fault of the person guilty of such technical conversion, he is not answerable for the loss thereof.

SHERIFF, WHEN NOT LIABLE FOR LOSS BY FIRE OF PROPERTY LEVIED UPON.—If a sheriff under a writ against one person levies on the property of another, without taking it into his possession or doing any act which would prevent such owner from taking possession of and disposing of such property, and it is subsequently destroyed by fire, without the fault of either party, the sheriff is not answerable therefor.

SHERIFF, WHEN NOT LIABLE IN TROVER FOR A WRONGFUL LEVY.—Though the levy of an attachment was wrongful, yet if the owner of the property was not thereby deprived of its care or custody, he cannot maintain an action for its conversion commenced after its loss by fire without the fault of the officer.

Stephen M. Young, for the plaintiffs in error.

Andrews Brothers, for the defendant in error.

516 MINSHALL, J. On an order of attachment, issued by a justice of the peace in a suit before him of Anson Sammis against Edward Goodrich, S. P. Towne, a constable, to whom the writ was directed, on September 19, 1891, levied the same on a stack of rye on the premises of Goodrich. The levy was made by laying his hands on the stack, and in the presence of witnesses declaring that he made the levy on it under his writ, as the property of Goodrich; and, after causing it to be appraised, left the stack where he found it, by the direction of the plaintiff,

and returned that he had duly attached it. No actual possession was taken of the property. After this the property was destroyed by fire, without the fault of the constable or attaching creditor. The property was claimed by Robert Sly, who afterward, on September 19, 1892, commenced an action in the common pleas court against the constable and plaintiff in the attachment suit to recover as damages the value of the property, on the ground that, by the levy of the attachment, the property had been converted to the use of the defendants, and he had been prevented from thrashing it as he would have done before the fire. The defendants claimed that no actual possession had been ^{§17} taken of the property, and that, as a matter of law, the property had not in fact been attached, the property not having been taken into the actual possession of the constable as required by section 6493 of the Revised Statutes. The issues having been made up, the case was tried to a jury, which rendered a verdict against the defendants for the sum of one hundred and twenty-four dollars and fifty-eight cents. A motion for a new trial was made, and overruled by the court, and exceptions taken by the defendants, and judgment was rendered on the verdict; which, on error, was affirmed by the circuit court. The principal errors assigned arise upon the charge of the court and on its refusal to charge as requested.

The court, among other things, was requested to charge the jury that:

"1. It is the duty of an officer, after he has attached property, to retain possession of it; he has no right to allow the property to remain in the possession of the defendant in the attachment; if, therefore, you find that Mr. Towne, after attaching the property in this action as the property of Goodrich, or that were in the possession of Goodrich, without appointing anyone to take charge of the same, and that he himself left said premises and departed therefrom, such action on the part of the constable was an abandonment of the levy, and if thereafter the property was destroyed by fire, there can be no recovery for such loss in this action.

"2. If the jury find from the evidence that the premises whereon the stack of rye in dispute is situate was in the possession of Goodrich, that after the constable attached said stack as the property of Goodrich, he went away from said premises leaving said stack thereon, and never ^{§18} thereafter asserted nor exercised any control over said stack, then in that case the jury

have the right to find that the levy of said attachment was abandoned, and if thereafter said stack was destroyed by fire, the said plaintiff cannot recover for said loss in this action.

"3. Even though the levy of the attachment upon the property in this action was wrongful, and the same had not been abandoned prior to the destruction of the stack by fire, yet if the fire was not occasioned by such wrongful taking, and was not caused by the defendants, or either of them, or was not caused by the negligence of them, or either of them, then in that case there can be no recovery in this action for such loss or for the value of said property.

"4. A levy of an attachment upon property belonging to one person as the property of another is wrongful, but if, after such wrongful levy is made, the officer making the levy at the direction of the attaching creditor does not retain the property in his custody, but leaves it upon the premises of the debtor, where the same was found, so that the said debtor or the real owner could have taken possession of the same without the knowledge of said officer, or anyone representing him, and thereafter the property is destroyed by fire, the real owner of said property cannot, after said loss, elect to treat said wrongful levy as a conversion of said property."

Each of these requests was refused, and the defendants excepted. The court then charged the jury that: "The only question for you to determine is that of the value of the stack of rye, and in determining that, the burden of proof is upon the plaintiff. ⁵¹⁹ In determining this question, you will look at all the evidence, and will say by your verdict what was the value of that stack of rye at the time this levy was made, on the nineteenth day of September, 1891." To which an exception was also taken by the defendants at the time and duly reserved.

In so charging and in refusing a number of the charges requested, we think the court erred. The gist of the plaintiff's action is a conversion of his property by the defendants, not negligence in the care of it. The conversion was, at most, a technical one, a dealing with the property of the plaintiff as if it were that of the judgment debtor. The property was not, in fact, converted; all the officer did was to place his hands on the stack, saying, as he did so, that he attached it as the property of the attachment debtor. It was then left where found. For this it will be conceded the owner, Sly, had the right to treat the levy as a conversion of his property. The effect of such suit is to

abandon the property to the wrongdoer, and, in consideration of this, the law gives to the plaintiff a recovery of its value. But the owner, whose property has been wrongfully intermeddled with, is not bound to pursue this remedy. He has the election to do so, or recover the property in an action of replevin, based upon his title. Until he makes his election by bringing a suit for conversion the title remains in him; otherwise he could not at his election maintain replevin. In other words, a mere intermeddling with another's property in a way to deny his title does not, of itself, divest his title. He may treat it as such by commencing an action for a conversion, but, until this is done, the title remains in ⁵²⁰ him. In this case the suit for conversion was not commenced until some time after the fire, so that at the time of the fire the title to the stack of rye was in the plaintiff, and no negligence having been imputed to the defendants as the cause of the fire, the owner of the property, the plaintiff, at the time of the fire, must bear the loss in accordance with the maxim *Res perit domino*. True, the plaintiff says that but for the levy he would have thrashed the rye before the fire, and that he was prevented thereby from doing so. This must be considered in connection with the undisputed facts. He was no party to the proceeding in attachment, and the levy could not, therefore, like an injunction, in any way restrain him from exercising his rights of ownership. The actual possession not being disturbed, he had the same right and ability to take care of his property that he had before the levy; and, if he failed to do so, it was his own fault. The levy, as made, did not deprive him of the right nor make it unlawful for him to do so. If he were the owner of the property as claimed, he would be liable to no one for dealing with it as he pleased, notwithstanding the levy.

If the property had been taken into the actual custody of the officer and so as to deprive the owner of any control over it, a different rule of liability might apply. In such case, there would be much reason for holding that, irrespective of the question of care, the officer, having wrongfully deprived the owner of the care of his property, should be liable for its loss from any cause, other than the act of God or public enemies; for, in such case, but for the wrong, the loss might not have occurred. But, as between the officer and ⁵²¹ the creditor or the debtor in the attachment suit, it seems well settled that the officer is not liable for the destruction of the property while in his custody by fire or other means, unless guilty of a want of ordinary care:

Swan's Treatise, 16th ed., 291; Story on Bailments, 2d ed., sec. 132; Crocker on Sheriffs, 3d ed., secs. 448, 855. This rule is placed by Story on the ground that the officer is a bailee for hire, and should not be held to a greater nor less degree of liability than is required by the common rule in such cases—ordinary diligence. But as to a third person whose property has been wrongfully taken under the writ, the reason does not seem to apply. As to such person, he would seem to be a wrongdoer, and not a bailee of any kind. But this question is left undecided, and the decision placed on the grounds before indicated—that the owner was not in fact deprived of the custody of his property, nor of the title thereto by the levy; and the fire not being referable to the levy, nor to any want of care on the part of the officer, the loss occasioned by the fire fell to the owner of the property.

A question might also be raised as to whether there was any attachment of the property in fact, the property not having been taken into the actual custody of the officer as required by section 6493 of the Revised Statutes: And see Shinn on Attachment and Garnishment, sec. 244; Drake on Attachment, sec. 292 a; Waples on Attachment, 175. It was on this ground that, in *Root v. Railroad Co.*, 45 Ohio St. 227, it was held that the property sought to be attached in that case had not been attached as against the subsequent levy of a judgment creditor. But it is not necessary ⁵²² to decide this question here; for although it was held that, for the purposes of an attachment, such custody was taken as the nature of the property would permit, yet it was not such as precluded or hindered the owner from taking care of it himself. At the time of the fire he claimed to own the property, and did in fact own it, having as yet commenced no suit for the conversion of it.

He does not even claim that, by reason of the levy, he had become remiss in caring for it. And such claim, if true, would, for reasons before stated, be of no avail in an action for conversion commenced after the fire. It is fair to presume from his claim of ownership that he took the same care of the property after the levy as before, and, in bringing this action simply seeks a double advantage, or, in the language of the old adage, "seeks to have his cake and eat it too."

The court then erred in charging the jury that the only question for it to determine was the value of the stack of rye. There was the question as to the actual ownership of the property;

whether any levy had in fact been made that bound the property in attachment; and, if so, whether such custody and control had been taken by the officer as to hinder the plaintiff from taking care of it. This we think was so radically wrong as to require a reversal of the judgment, whether any of the particular requests of the defendants should have been given or not.

But we are of opinion that the fourth request should at least have been given. The gist of this instruction is, that conceding the attachment to have been wrongful, yet if by it the owner was not deprived of the care and custody of his property, he could not maintain an action for ⁵²³ the conversion of it commenced after its loss by fire. This is in accordance with the view we have taken of the law applicable to the case.

And on the question whether the property had in fact been attached, the first instruction asked and refused properly stated the law applicable thereto.

Judgment reversed and new trial awarded.

TROVER—JUDGMENT IN—EFFECT ON TITLE.—A judgment in trover does not transfer the title to the property: *Miller v. Hyde*, 161 Mass. 472; 42 Am. St. Rep. 424, and extended note. See, also, the extended note to *Woolley v. Carter*, 11 Am. Dec. 523.

TROVER WILL NOT LIE AGAINST AN ATTACHING OFFICER for neglect in not taking proper care of the property attached: *Abbott v. Kimball*, 19 Vt. 551; 47 Am. Dec. 708, and note. See, also, the extended notes to *Palmer v. St. Albans*, 6 Am. St. Rep. 182, and *Bolling v. Kirby*, 24 Am. St. Rep. 800.

HENLINE v. REESE.

[54 OHIO STATE, 599.]

REPLEVIN.—THE OMISSION OF A PLAINTIFF in an action of replevin to sign the affidavit upon which he obtains the writ is at most an irregularity which does not invalidate the writ nor deprive the officer of protection in executing its commands.

SHERIFF—JUSTIFICATION OF UNDER A WRIT VOID FOR WANT OF JURISDICTION.—While a ministerial officer, having knowledge from a source other than the writ that the court or officer issuing it was without jurisdiction of the person against whom it was directed, is not obliged to serve it, and may decline to do so without subjecting himself to any liability, yet he may, nevertheless, relying on its regularity, execute it according to its commands, and plead it in justification of his acts in doing so.

PRINCIPAL AND SURETY.—THE LIABILITY OF THE LATTER IS DEPENDENT UPON THAT OF THE FORMER, and an action cannot be maintained against one as surety if his principal is not liable. This remains true though the surety might have been sued as principal and a recovery had against him in that capacity, as where he who was sued as a surety on the bond of a

constable was himself liable for the act of the constable, though the latter was protected from liability by a process in his hands regular upon its face.

Dodge & Canary, for the plaintiffs in error.

Baldwin & Harrington, for the defendants in error.

¶ WILLIAMS, C. J. The original action was brought in the court of common pleas of Wood county, by ¶ William T. Reese, the defendant in error, against Jonas Henline and Nathan W. Stafford, on the bond of Henline as constable of Liberty township in that county, to which office he had been duly chosen, Stafford being surety on the bond. The bond, which was duly executed, is in the usual form, conditioned for the faithful performance by Henline of his duties as such constable. The alleged breach of the condition consisted of a seizure by the constable of certain chattel property of the plaintiff, on a writ of replevin issued against him by Stafford as a justice of the peace of the same township, which office he then held. The writ, it is claimed, was void for want of jurisdiction of the justice to issue it, and the constable and his surety became liable on the bond for the damages sustained by Reese in consequence of the proceedings under it. Upon issues joined in the action, the cause was tried to the court, and a finding made of the facts, which, in addition to those already stated, are, in substance, as follows: 1. At the time of the commencement of the replevin suit, and the service of the writ, Reese was not a resident of Liberty township, but resided and was a householder in another township of Wood County, which was known to both the justice and constable; 2. The affidavit filed by the plaintiff in the replevin suit was not signed by him, though it was in fact sworn to by him before the justice, who certified thereto, and it contained a proper description of the property, and a statement of all facts required by the statute; 3. The writ of replevin issued by the justice and delivered to the constable was in due form of law, regular on its face, and disclosed no want of jurisdiction of the justice to issue it; 4. The constable found ¶ the property described in the writ in his township, and there took the same into his possession, caused it to be appraised, and, after taking from the plaintiff an undertaking in replevin in the requisite amount, delivered the property to him; 5. At the time of the seizure of the property, the constable, finding Reese in the township where the writ was issued, made personal service there upon him of a summons, which accompanied the writ of replevin, but did not deliver to him a copy of the latter writ; 6. Return

was made of the process and undertaking to the justice in due time, and afterward, on the return day, Reese filed his motion before the justice of the peace to dismiss the action for want of jurisdiction of his person, which was sustained, and the suit accordingly dismissed; whereupon demand was made of the constable for the return of the property, which he was unable to comply with, having previously delivered it to the plaintiff in the suit and filed his undertaking with the justice. The court also found the amount of the plaintiff's damages, if upon the facts he should be entitled to recover any; but, being of opinion that, on the facts found, the defendants were not liable on the bond, judgment was rendered in their favor, which judgment the circuit court reversed, holding that on the facts found the plaintiff should have judgment, and accordingly rendered judgment for him. We are called upon to decide which of these judgments is the correct one.

The omission of the plaintiff in the replevin suit to sign the affidavit upon which he obtained the writ was at most an irregularity which did not invalidate the writ, nor deprive the constable of protection in executing its command. A ministerial officer, before executing process ⁶⁰⁴ placed in his hands, is not obliged to inquire into the regularity of the proceedings of the tribunal from which it emanates, and determine at his peril whether it was lawfully issued or shall be obeyed. His duty is to execute it, if in due form of law, regular on its face, and comes duly authenticated from a court or magistrate having jurisdiction of the subject matter.

The position taken by counsel for the defendant in error, which was apparently adopted by the circuit court, is, that the justice issuing the writ was without jurisdiction of the case, because the defendant did not reside in his township, but was a resident householder of another township of the same county; and that fact being known to the constable, his writ afforded no justification for any act done under it. The statute affecting the jurisdiction of justices of the peace in this respect provides that a resident householder or freeholder of the county shall not be held to answer a summons in a civil matter in any township of such county, other than the one in which he resides, except when there is no justice of the township where he resides, or the only justice therein is interested in the controversy or is related in certain degrees to either of the parties. Assuming here, without intending to be understood as so holding, that knowledge that the

defendant was a resident householder of another township constituted knowledge of a want of jurisdiction of the justice to issue the writ, it does not follow, we think, that the constable must be held liable for executing it, when done in a lawful manner. The justice unquestionably had jurisdiction of actions for the replevin of property of the kind described in the writ, and to issue such process. ⁶⁰⁵ That delivered by him to the constable for service was duly authenticated, regular in form and substance, disclosing no want of jurisdiction to issue it, and in all respects was such a writ as the justice had apparent authority to issue; so that any knowledge the constable may have had concerning the defendant's residence was derived from sources outside of the writ. We understand the rule in such a case to be, that while a ministerial officer who has knowledge from a source other than the writ that the court or magistrate issuing it is without jurisdiction of the person against whom it is directed is not obliged to serve it, and may decline to do so without creating a liability for his failure, he may, nevertheless, relying on its regularity, execute it according to its command, and plead it in justification of his acts in doing so: Crocker on Sheriffs, sec. 283; Swan's Treatise, 504; People v. Warren, 5 Hill, 440; Webber v. Gay, 24 Wend. 485; Watson v. Watson, 9 Conn. 140; 23 Am. Dec. 324; Wilmarth v. Burt, 7 Met. 257; Erskine v. Hohnbach, 14 Wall. 613; Wall v. Trumbull, 16 Mich. 228, 233; and see Taylor v. Alexander, 6 Ohio, 145; Harmon v. Gould, Wright, 709; Sandford v. Nichols, 13 Mass. 286-288; 7 Am. Dec. 151. We are aware that there are some cases which hold a different doctrine; but the rule, as we have stated it, is maintained by the great weight of authority, and rests upon sound reason. It is essential to an efficient administration of the law that there be effectual execution of legal process, to the accomplishment of which promptness and expedition are necessary. Questions of jurisdiction are often difficult of correct determination, depending sometimes for their proper decision upon complications of fact, and involving the employment of legal learning and judicial investigation; and to ⁶⁰⁶ require ministerial officers with process in their hands for execution to stop and determine such questions by looking beyond the face of the process before proceeding to execute its precepts would not only be incompatible with the nature of their office, and the proper discharge of their duties, but must necessarily retard the administration of justice, and often obstruct or defeat the remedies of parties. The officer may honestly believe that he is in possession

of information beyond the writ that deprived the tribunal from which it came of jurisdiction over the party, and yet be mistaken; or he may in good faith believe there was such jurisdiction, and yet have knowledge of facts which exclude it; and if he could be charged with a liability for every such erroneous, though honest, judgment, on the question of jurisdiction, it is not difficult to understand the delays and embarrassments that must result in the business of the courts. 'This case not inaptly serves to show the difficulties of such a rule.' It is contended the constable was sufficiently apprised of the justice's want of jurisdiction to entertain the action against the defendant in replevin, because he knew the defendant was a resident householder of another township in the county; but it is evident that under the statute that fact alone was not sufficient to deprive the justice of jurisdiction, for, notwithstanding that fact, the jurisdiction would exist if there were no justice in the defendant's township who was disinterested, or who was not related, in the prohibited degrees, to either of the parties; so that, to wholly exclude the jurisdiction of the justice, all of those facts must concur, and therefore, knowledge of one of them only would not be ^{enough} knowledge that the justice was without jurisdiction.

If it were true that as between the parties in such an action, when the defendant should prove he was a resident householder of a different township it would then be incumbent on the plaintiff, in order to sustain the jurisdiction, to prove one of the other facts which authorize the justice to entertain the action, such a rule could hardly be applicable in a suit against the constable on his bond for executing process issued by the justice, unless, having information which, if followed up by diligent inquiry, would lead to knowledge of all the facts which would exclude the justice's jurisdiction, he is to be charged with such knowledge. That would involve a large inquiry, and make the officer's liability depend not upon the knowledge he had, but on that which he might have obtained. It is a more reasonable rule that the officer is entitled to protection in the execution of his writ when it is regular on its face; and that he is not affected by information received outside of it, nor liable for acts done in its proper execution, unless there is a want of jurisdiction to issue it which appears from the writ itself.

It is argued that the facts found by the trial court entitle the plaintiff to judgment against the justice. But we think not. The action is brought on the constable's bond, and the liability

sought to be enforced against the justice is that of surety on the bond; and, as the constable is not liable, the surety cannot be held. What remedy the plaintiff may have against the justice, individually, or against the party who instituted the replevin suit, are not questions now before us for determination. We ~~do~~ think the judgment of the circuit court was erroneous and must be reversed, and that of the common pleas affirmed.

Judgment accordingly.

REPLEVIN.—AFFIDAVIT upon which a writ of replevin issues, if substantially in the language of the statute, is sufficient: *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350.

SHERIFFS—PROCESS AS JUSTIFICATION.—A void execution will not justify acts done under it previous to its being set aside: *Coltraine v. McCaine*, 8 Dev. 308; 24 Am. Dec. 356. In an action against an officer by the party against whom process issued to recover for an illegal seizure, the process, if valid, constitutes a complete justification: *Townaly & Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181; 41 Am. St. Rep. 97, and note. See, also, the extended note to *Savacool v. Boughton*, 21 Am. Dec. 190.

SURETYSHIP—LIABILITY OF PRINCIPAL.—If no cause of action exists against a principal on a bond, there can be none against the surety: *Eising v. Andrews*, 66 Conn. 58; 50 Am. St. Rep. 75.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BROWN v. PETTIT.

[178 PENNSYLVANIA STATE, 17.]

NEGOTIABLE INSTRUMENTS—PARTNERSHIP NOTE—INDORSEMENT BY ONE PARTNER.—If one member of a partnership makes a note in his own name payable to the order of his firm, indorses the name of such firm thereon, and requests a bank to place the proceeds of the note, after discount, to his personal credit on its books, the bank thereby has notice of such facts as puts it on inquiry, and prevents it from becoming a bona fide holder, in case such indorsement is unauthorized.

J. W. Bouton, J. M. McClure, and W. P. Weston, for the appellants.

T. A. Lamb, F. P. Schoonmaker, W. W. Brown, and A. P. Huey, for the appellee.

19 GREEN, J. In this case the undisputed facts were that Webb Evans was the maker of the note in his own name, made it payable to the order of his firm, Davis & Evans, indorsed the name of the firm on the note and requested the plaintiff to place the proceeds of the discount to his personal credit on the books of the bank. As between Webb Evans and the firm of Davis & Evans, on the face of the paper, disregarding the forged indorsement of Joshua Davis, the proceeds of the discount should have been placed to the credit of Davis & Evans. That firm, as well as Webb Evans, had an account on the books of the bank and in ordinary course should have had credit for the proceeds. Had Webb Evans indorsed the note in his own name after the indorsement of Davis & Evans, then the face of the paper would have presented an apparent title in Webb Evans, and, in its ordinary commercial aspect, the paper with the personal request of Webb

Evans to have the proceeds placed to his credit would not have been out of the usual course. But with the apparent title to the note being in Davis & Evans, a request by the maker to have the proceeds placed to his individual credit was out of the usual course, and we think, under the authorities, the bank became subject to a duty of inquiry.

It seems to us that these facts bring the case within the ruling in *Cooper v. McClurkan*, 22 Pa. St. 80, and *Tanner v. Hall*, 1 Pa. St. 417, and distinguish it from the other cases cited for the appellee. In *Cooper v. McClurkan*, 22 Pa. St. 80, the facts are briefly stated in the opinion thus, "McClurkan and Fleming were partners in trade and Fleming drew a bill of exchange of the partnership on himself, and negotiated it to the plaintiff, and now, in a suit upon it, McClurkan defends on the ground that it was not a partnership transaction. This appears to be well taken, for the case, without other evidence, stands just as if Fleming had given the indorsement of his partnership on his ²⁰ own note as security for his own debt, which he could not do: *Tanner v. Hall*, 1 Pa. St. 417." This is precisely what was done by Webb Evans. He gave his own note to his firm for the amount of the debt. He then indorsed the firm name on the note, and therefore pledged the liability of the firm for his own debt, and this he could not do. The proper thing for him to do in ordinary commercial usage would have been to deposit the note, or its proceeds if discounted, to the credit of the firm. When he did not do that he departed from the usual course in requesting the bank to place the proceeds to the credit of his private account, and thereby made a manifest misappropriation of the firm's money to his own use. The responsibility of the bank in such circumstances is thus shown in the opinion of Lowrie, J., in the case just cited.

He says: "The plaintiff says he is a bona fide holder without notice of the character of the paper. Is he without notice? He is not if the proper inquiries usually made by a prudent man would have led him to the knowledge of the fact that the acceptor, or principal debtor, had himself drawn the bill, or, in other words, made the contract that is intended to pledge the partnership as surety for himself. Common prudence demanded that the authenticity of the signature of the drawers should be ascertained, and this led directly to the fact that it was made by Fleming himself, and common sense would indicate that Fleming had no right to bind his partner as his surety. It is urged that, in borrowing money, copartners may give to their negotia-

ble paper what form they please, and that therefore they ought to be liable here notwithstanding the form. The premise is true, but the conclusion needs for its support the proof that the co-partners did borrow the money. If they did, then Fleming is an accommodation acceptor, and the drawers are bound as the real debtors. Without this proof we must take the apparent transaction to be the true one, and regard Fleming as borrowing money for himself and attempting to pledge his partner as his surety; that is, we must decide the case according to the evidence." Every word of this is directly applicable to the case at bar, only with increased force, because here the paper was the direct obligation of Webb Evans alone to his firm, and was palpable notice to the bank that it was his private debt to his firm. When he ²¹ indorsed the firm's name and asked the banker nevertheless to place the proceeds to his individual credit, it was a direct and immediate application, with the knowledge and consent of the banker, of the firm's money to the personal use of the maker.

Tanner v. Hall, 1 Pa. St. 417, is in the same line. We held there that an indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. Gibson, C. J., stating the facts, said: "Hall drew the note in question in favor of H. Cochran & Co., procured their indorsement of it, indorsed it with the name of his own firm, had it discounted at the Lumberman's Bank and had the proceeds of it put to the credit of his personal account. . . . But that Hall had drawn ostensibly for his separate accommodation sufficiently indicated that his firm's indorsement was also for his separate accommodation, and made it the duty of the bank to inquire into his authority for the act, as it would have been bound to do had he indorsed the name of the firm on the note of a stranger. The bank, then, and the present holder are affected with knowledge that the transaction was a separate one; and we have the naked case of a note indorsed with the name of a firm in a transaction out of the line of its business; from which the conclusion is unavoidable that it was discounted on the faith of an indorsement which was void for want of previous authority or subsequent confirmation." The present case is stronger than this, because there was no intervening third party outside of the firm who had made a genuine indorsement for the accommodation of the maker. Here the transaction was direct.

The partner made his own note to his own firm and then indorsed the firm name, and, with the knowledge and participation of the bank, took the proceeds to his own use. It was affirmatively testified by the other partner that he knew nothing of the transaction, that the firm got no part of the proceeds directly or indirectly, and it was not shown that there was any course of dealing by which indorsements of the firm name by Webb Evans on paper such as this was ever sanctioned or approved by the firm. The nature of the transaction directly informed the bank²² that the firm indorsement was made by Evans for his private use, and that knowledge put them upon inquiry.

In the case of *Miller v. Consolidated Bank*, 48 Pa. St. 514, 88 Am. Dec. 475, Agnew, J., in commenting on *Tanner v. Hall*, 1 Pa. St. 417, and pointing out the difference between the two cases, said: "The case of *Tanner v. Hall*, 1 Pa. St. 417, differs widely from this. There Hall drew his separate note for his own accommodation to the order of another firm, who indorsed it, then he indorsed the name of his own firm and procured it to be discounted. It was held that the form of the note and the circumstances sufficiently indicated to the bank that the note was for his individual accommodation, and thus put the bank upon notice."

The case of *Haldeman v. Bank of Middleton*, 28 Pa. St. 440, 70 Am. Dec. 142, is cited for the appellee with much confidence, and is claimed to rule this case. But a very slight examination of the facts of that case shows it to be radically different from this. The draft was drawn in the firm name in favor of Haldeman who was one of the partners. Ostensibly, therefore, and on the face of the paper, it purported to be the obligation of the firm to one of its own members. Upon such paper the payee was apparently the owner of the paper, and in regular course of business would be entitled to have the proceeds of the draft. There was nothing to give notice to the bank that the transaction was out of the usual course, or was, or was intended to be, a fraud upon the firm. It was upon these grounds that the case was ruled. Said Knox, J., in delivering the opinion: "The case depends upon the question whether the bank was bound to inquire as to the authority of Haldeman to draw the draft in the firm name. It is not pretended that the bank had actual notice that the discount was for Haldeman's separate use; but it is alleged that the form of the draft was sufficient to put the bank upon inquiry. The draft was made payable to Peter Haldeman's order. Was this an indication that it was not drawn by the firm in the usual

course of its business? Certainly it was not; for although it may not be the ordinary form in which bills are drawn, it is by no means an unusual transaction, when the object of drawing a draft is to raise money for a firm, that it should be made payable to the order and indorsed by one of the members of the firm. . . . Where a draft or bill drawn in the name of the firm by one of the partners is offered for discount, ²⁸ the presumption is, that drawing the draft was a partnership transaction, even although it was made payable to the order of one of the members of the firm. Actual knowledge that a bill or note purporting to be drawn or made by a firm was given without the consent of some of the partners is a good defense as to the nonconsenting partners, but the presumption that the paper is what it purports to be cannot be overthrown upon a mere matter of form in inserting the name of one of the members of a partnership as payee."

The case of Ihmsen v. Negley, 25 Pa. St. 297, is also of the same character, as is fully explained in the opinion in the last case cited. We think the assignments of error are all sustained.

Judgment reversed and venire de novo awarded.

PARTNERSHIP.—A note given in the name of the firm by one partner for his own private debts, and known to be so given by the person taking it does not bind the firm unless they had previously consented to the transaction: *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173, and note; *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273, and note; *Taylor v. Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430; *Mechanics' etc. Ins. Co. v. Richardson*, 33 La. Ann. 1808; 89 Am. Rep. 290, and note. The note of a firm given for a private debt of one partner is good against the firm in the hands of a bona fide holder: *Haldeman v. Bank*, 28 Pa. St. 440; 70 Am. Dec. 142, and note; *Flemming v. Oathcart*, 3 Rich. 307; 45 Am. Dec. 766.

FINK v. FARMERS' BANK.

[178 PENNSYLVANIA STATE, 154.]

EQUITY—RELIEF AGAINST MUTUAL MISTAKE.—Equity cannot grant relief in cases of mutual mistake of legal rights, where it is impossible to restore both parties to the status quo.

EQUITY—RELIEF AGAINST MISTAKE.—A surety on the bond of a defaulting bank cashier, who, laboring under a mistake of the legal effect of the facts, gives his notes in settlement of such defalcation, is not entitled to a redelivery of the notes to him unless the parties have remained, or can be placed, in statu quo.

SURETYSHIP—INTERPRETATION OF CONTRACT.—A contract of suretyship, though only enforced according to its terms, is, nevertheless, nothing more than a contract, and, in construing it, the actual intention of the parties must prevail.

OFFICERS—OFFICIAL BONDS—CONTINUING LIABILITY.—The presumption that official bonds apply only to the existing

term of the officer is not conclusive; and if it is clear that the parties meant to create a continuing liability, the bond must be held to have done so.

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—A note given by a surety on the bond of a defaulting bank cashier in settlement of defalcation, is supported by sufficient consideration if it appears that because the note was given, the bond was surrendered, or that the bank forbore to sue thereon, or that it was given as a compromise and credited on the cashier's account, or that, in reliance on such compromise, there was a change in the position of the parties, so as to make restoration of the status quo impossible, or that the credit of the bank was maintained by such compromise, or that it was the basis for permission given by authority to continue the banking business.

Bill for an injunction and to compel the delivery of certain promissory notes. Frederick C. Fink was elected cashier of the Farmers' Bank of Harrisburg in May, 1873, and thereupon entered upon the discharge of the duties of his office, and he executed and delivered to the bank a bond, dated July 21, 1873, in the sum of twenty thousand dollars, with his brother, Henry Fink, the plaintiff, as surety, the bond being conditioned as follows: "The condition of the above obligation is such, that whereas the above bounden Frederick C. Fink has been appointed cashier in the said Farmers' Bank, of Harrisburg, Pa., now therefore the condition of the above obligation is such that if the bounden Frederick C. Fink shall well, truly, and faithfully perform all the duties assigned to and trust reposed in him as cashier of the said Farmers' Bank, of Harrisburg, Pa., so long as he shall continue in that capacity, then the above obligation to be void, otherwise to be and remain in full force, virtue, and effect." F. C. Fink was re-elected in May, 1874, and annually thereafter down to the time the bank was closed in 1893, when it was discovered that he had misappropriated the funds of the bank to the amount of about twenty-seven thousand dollars. From the facts reported by the master, it appeared that "on February 17, 1893, the superintendent of banking, suspecting that the condition of the Farmers' Bank was not what the published reports of its cashier and directors showed it to be, and for other reasons, which do not clearly appear by the testimony, caused an examination into its affairs to be instituted, with the result that he on that day discovered the cashier to be a defaulter to an amount exceeding twenty-five thousand dollars. Later in the afternoon of the same day he called together some of the directors at the banking house and informed them of his discovery. The cashier, being called before them, admitted the defalcation and the approximate accuracy of the amount alleged, produced the bond referred to above

in paragraph 4, and stated that the plaintiff, who was surety on the bond, would stand good for twenty thousand dollars, the amount of his bond. He was thereupon directed to communicate with the plaintiff and report the result of his interview at a meeting of the directors to be held later in the evening. He accordingly called upon the plaintiff, laid before him his trouble, and reminded him that he, the plaintiff, was on his bond, and, at the subsequent meeting of the directors, reported that he had seen the plaintiff and suggested that some of the directors should call upon him. In pursuance of this suggestion, one of the directors, who was also their legal adviser, called upon the plaintiff at his place of business early the next morning. The interview was a brief one, and went little beyond fixing a time for the plaintiff to meet the directors at the banking house. It is to be noted, however, that in this interview the plaintiff spoke of being on his brother's bond, and declared his intention of paying the amount of it. A few hours later, the plaintiff called at the banking house, and there met three of the directors, among whom was their legal adviser. Without much preliminary conversation, after an offer of certain railroad bonds had been made and rejected, the plaintiff offered the four notes mentioned in the bill of complaint, one of which was for five thousand dollars and each of the others for a like sum with interest, in payment of the amount of the bond, and his offer was accepted. The notes were accordingly drawn up, signed by the plaintiff, and handed over to one of the directors, and the bond, which in the mean time had been lying on the table before the parties unopened and unread, was surrendered to the plaintiff. 12. The plaintiff was unattended by counsel and had previously consulted none, and his attention was not called to the terms of the bond, but he made no inquiry of the directors present or either of them with respect to his liability on the bond, or with respect to the affairs of the bank or the defalcation of the cashier, and no statement was made to him by them or either of them with respect to these matters; nor was there, so far as appears by the evidence, any intentional concealment by them, or either of them, from him of any fact relating to these matters, nor any willful misrepresentation, either at this time or before, of any matter affecting his liability. 13. The master finds that the four notes referred to in the bill of complaint were given, partly, at least, in satisfaction of the bond, and that they were given in the belief, shared at that time by all parties, that the same was a continuing bond, and that the plaintiff was liable thereon for the defalcations of the

cashier; but he further finds that in giving said notes, the plaintiff was moved, not merely by his belief that he was liable on the bond, but also by a desire to relieve the cashier, who was his brother, to continue him in his employment, and to save the family name from disgrace. 14. A few days after the notes were given by the plaintiff, the amount represented by them was credited in the books of the bank in the hands of the agent for liquidation upon the indebtedness of F. C. Fink to the bank, and a judgment bond in the sum of ten thousand dollars was given by said F. C. Fink to cover the remainder of his indebtedness, and judgment thereon was entered in the court of common pleas of Dauphin county. But there is no evidence that said credit was given in pursuance of any agreement or understanding with the plaintiff or that he knew it had been given. 15. Two or three days after the notes were given or possibly the next day, F. C. Fink transferred to the plaintiff a policy of insurance on his life, a few shares of stock in the Farmers' Bank and a small amount of other property. F. C. Fink was at that time indebted to the plaintiff in the sum of one thousand dollars, and the latter was also indorser for him on notes in the Farmers' Bank aggregating about three thousand five hundred dollars, which were subsequently paid by the plaintiff. There is no evidence showing any direction by F. C. Fink that these securities should be applied to any particular account, or that they were applied to any particular account by the plaintiff. 16. At the time the notes were given, and for several days thereafter, it appears to have been the intention of the directors to make good the impairment of the capital stock, and continue the business of the bank, to which course the superintendent of the banking department appears at first to have assented, but for some reason not fully explained, the latter subsequently changed his mind and insisted upon the business of the bank being wound up, and the directors, yielding to his demand, closed the bank and placed its affairs in the hands of the defendant E. Bailey as agent for liquidation. 17. At the time the bill was filed, three of the notes above mentioned were unnegotiated and in the hands or under the control of the defendants. The note for five thousand dollars falling due first was paid at maturity by the plaintiff." The master found, as conclusions of law, that the bond given by F. C. Fink as cashier of said bank, was an annual bond and continued in force only during the year ending May, 1874; that plaintiff was not, at the time he gave such

notes, liable upon said bond for any part of the defalcation of such cashier; that said notes were not based on any consideration but upon a mutual mistake of all parties that plaintiff was liable as surety on the bond of said cashier for his defalcations; that plaintiff is entitled to a decree for the delivery to him of all of the notes before mentioned, except the first which he had already paid. The lower court entered a decree in accordance with the findings of the master, and the defendant appealed.

L. D. Gilbert, T. S. Hargest, and C. H. Bergner, for the appellant.

R. Snodgrass, for the appellee.

¹⁰⁶ MITCHELL, J. The plaintiff by his bill seeks to rescind a contract and repossess the evidence of his liability. It is admitted that there was no accident, and no concealment, imposition, or other element of fraud. But the learned master found there was such a mistake by the plaintiff as to his liability on the bond as to ¹⁰⁷ bring his case within that class of mixed mistake of law and fact against the consequence of which courts of equity sometimes relieve. After a very clear and able review of the decisions in England and some other states, the learned master says frankly that he "feels some embarrassment in applying this doctrine to the case in hand in view of some of the decided cases in this state," but nevertheless concludes that he may do so. The Pennsylvania cases have not yet followed the refinements by which the ancient rule that ignorance of the law excuses no man has been restricted, if not frittered away, by exceptions, and equity has so far contended itself with relief in cases of mutual mistake of legal rights where it was possible to restore both parties to statu quo. If that cannot be fully done, equity will not assist one party to unload the burdens on the other. An illustration may be drawn from the present case. If the bank had first come to the opinion now advanced by the complainant, that not being liable on the bond he could not be held on the notes, and had at once passed the notes away for value and then filed this bill to rescind, the case would have met a summary dismissal for inability to restore the status quo. It is said that complainant tenders a return of the bond, but this would not restore the parties to their former situation, as in the mean time, in reliance on the validity of these notes, some of the defendants have incurred personal liabilities in aid of the bank. The evidence on this point was excluded for irrelevancy by the master,

but this was error, and we are entitled to take the averment as true in view of the burden of proof on complainant to show that the status could be restored.

It is not necessary to follow the master in his detailed examination of our cases on mistake of law, as the court below was of opinion that that question did not arise, and rested the decision exclusively on two grounds: 1. That the bond was not continuing, and there was no liability upon it; and 2. That there was no other consideration for the notes.

First, as to the bond. The condition is, that whereas F. C. Fink has been appointed cashier, etc., if he shall well, truly, and faithfully perform all the duties, etc., "so long as he shall continue in that capacity" then the obligation to be void, etc. The master learnedly and ably traced the rule as to the liability of sureties on official bonds from its origin in *Lord Arlington v. Merricke*, 2 Saund. 411, and other cases, in which the term of office was recited in the bond itself, down through its gradual enlargement until it has come in some states to a strong and almost conclusive presumption, which is most fully stated by Poland, C. J., in *Treasurer of Vermont v. Mann*, 34 Vt. 371, 80 Am. Dec. 688, as follows: "It seems now to be perfectly settled by authority, in reference to bonds or obligations given to secure the performance of official duties, that where the appointment is for a limited period, which is recited in the condition, or where it is not recited in the condition, but is fixed and determined by law, the obligation only extends for the period named in the condition or the term fixed by law, and will not extend to cover any extension of the time by a future appointment or subsequent election, although the language of the condition as to time be general and unlimited. The presumption in such cases is held to be that the language is used in reference to the existing office or appointment which the principal holds, and that the sureties do not intend to bind themselves for any indefinite and unlimited extent of time, depending upon the contingency of future elections."

It is conceded that this rule, even thus carefully stated, has never been expressly adopted in any Pennsylvania case. As a surety's contract is usually for the benefit of others, rather than directly for his own, it has always been held that he is entitled to have the conditions of his liability strictly fulfilled before it is enforced, and in the liberal application of this principle cases are probably not few in which courts have carried adherence to the letter in favor of sureties beyond any substantial equity. An il-

illustration will be found in *Shackamaxon Bank v. Yard*, 143 Pa. St. 129, 24 Am. St. Rep. 521, which will be referred to further on, and there is an instructive passage worth quoting, in the argument for appellant in that case, by one of the most learned lawyers that ever adorned the bar of this court, the late Richard C. McMurtrie, "there is no distinction between a surety and a principal so far as the construction or meaning or effect of a document is concerned. There is a broad distinction between the liability of the principal and of the surety. But not under the written contract. That may be varied by the principal, but it is not the contract that is varied; it is another contract that arises by implication which varies the liability. Naturally, the plea of *non in haec foedera veni* is never used by the principal, because he is sued not on the express contract but on that growing out of his conduct. I think it is sometimes overlooked that the apparent strain not to hold a surety is nothing but a strict exaction of the very contract, and this only because there is no other ground of liability."

The contract of suretyship, though only enforced according to its strict terms, is, nevertheless, nothing more than a contract. No particular form of words is necessary to be observed, and, in construing it, there is no reason why courts should not be governed by the rule applicable to all other contracts that the actual intention of the parties must prevail. As to official bonds, the presumption that they apply only to the existing term of the officer may be admitted, but the presumption is very far from conclusive, and if it is clear that the parties meant to create a continuing liability, the bond must be held to have done so. This was very explicitly and forcibly laid down as the rule in the well-considered and leading case of *Shackamaxon Bank v. Yard*, 143 Pa. St. 129; 24 Am. St. Rep. 521. The condition of the bond was for the faithful performance of the duties of cashier, "during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position." The cashier held over, but without re-election, and the default occurred after the expiration of his first term. The court below, adhering to the strict letter of the bond, held the surety discharged by the absence of a formal re-election, but this court reversed the judgment, and put the decision explicitly on the intention of the parties. "The purpose," said our brother Williams, "to make the bond impose a continuing liability and relieve against the necessity for annual renewals was a lawful one, and the words employed for that purpose are apt and sufficient."

If the present case was of first impression, we should have no hesitation in holding that the bond was continuing. The complainant, himself, in paragraph 3 of his amended bill, so states the belief and intention of the parties at the time of execution. How far deference to a line of cases in which the language was similar, but in none of them identical, might lead to a different conclusion, it is not now necessary to decide, as we are of opinion that there was ample other consideration for the notes.

¹⁷⁰ Secondly, as to consideration. Whatever the extent of the liability on the bond might finally have been determined to be if the contest had been fought out on it, there can be no question that it was an obligation to which complainant was a party, on which he could have been sued, and upon which the result of suit would have been open to doubt. Its surrender, therefore, was the settlement of a claim made on it, not then disputed, and not now open to dispute on the ground that it could not have been successfully maintained. The sufficiency of the consideration for a compromise is not to be determined by the soundness of the original claim of either party. The very object of compromise is to avoid the risk or trouble of that question. The settlement in the present case had all the substantial elements of a compromise, with only the unusual but immaterial feature that the claim was made and received not in a hostile but in an amicable spirit. The bank claimed twenty thousand dollars in cash on a bond on which it had an immediate right of suit; the complainant first promised Mr. Bergner part cash and the rest in notes, and, at the meeting with the directors, offered part in Allegheny Valley Railroad bonds and the rest in notes; the bank refused to take the railroad bonds, but, after some negotiation, agreed to accept four notes payable at various dates up to January, 1894, the effect of which would be to postpone the bank's present right of suit until the maturity of the notes respectively; the notes were made and delivered by complainant, and in return for them, as he says himself, he received back his bond. In the entire absence of fraud, accident, or mistake of any of the facts, there is no equity on which a court ought to disturb such a settlement. The cases on this subject have been diligently collected and very clearly arranged in the excellent argument of the counsel for appellant, but it is sufficient here to refer generally to the American notes to *Stapilton v. Stapilton*, 2 Lead. Cas. Eq. 1703.

Other items of consideration were urged by appellant: 1. Agreement for forbearance, already discussed incidentally in the preceding paragraph. 2. That the notes were given and received

as part payment of the brother's debt, and were accordingly credited on his account in the bank's books. The master finds this a voluntary act, there being no evidence of any express agreement that it should be done, but we cannot doubt ¹⁷¹ that it was a clearly implied part of the arrangement, and would have been so held if the bank had at once sued F. C. Fink for his whole debt. 3. That in reliance on this settlement there was a change in the position of the parties, so as to make a restoration of the status quo impossible. This also has been incidentally discussed already. 4. The credit to the bank, and the permission from the superintendent of banking to continue business. On this I will merely cite *Sickles v. Herold*, 15 Misc. Rep. 583, per Pryor, J., affirmed in general term, 15 Misc. Rep. 116, and affirmed with modification on minor point, 149 N. Y. 332.

All or any of these matters would afford sufficient consideration for the notes, but it is not necessary to discuss them further.

Decree reversed and bill dismissed with costs.

EQUITY—RELIEF AGAINST MISTAKE.—A contract cannot be rescinded in equity simply because it calls for the performance of an impossibility by reason of a mutual mistake of fact: *Du Bois Borough v. Du Bois etc. Waterworks Co.*, 176 Pa. St. 430; 53 Am. St. Rep. 678, and note. See, also, the extended note to *Miles v. Stevens*, 45 Am. Dec. 631.

OFFICIAL BONDS—NEW TERM—CONTINUING LIABILITY.—If an officer elected for a fixed term succeeds himself, the fact that no new bond is exacted cannot extend the liability of the sureties on the first bond: *Board of Administrators v. McKowen*, 48 La. Ann. 251; 55 Am. St. Rep. 275. See, further, the note to *King County v. Ferry*, 84 Am. St. Rep. 898.

NEGOTIABLE INSTRUMENTS.—Forbearance to one or the withdrawal of a suit already begun is a good consideration for the transfer of negotiable paper: *Mascolo v. Montesanto*, 61 Conn. 50; 29 Am. St. Rep. 170, and note; *Vann v. Marbury*, 100 Ala. 438; 46 Am. St. Rep. 70, and note.

HILL v. PENNSYLVANIA RAILROAD COMPANY.

[178 PENNSYLVANIA STATE, 223.]

NEGLIGENCE CAUSING DEATH—RELEASE OF RIGHT OF ACTION FOR—RIGHTS OF PERSONAL REPRESENTATIVE. If a husband, after receiving a personal injury, accepts a sum of money and gives an absolute release of all demands arising therefrom, his widow cannot maintain an action to recover for his death, resulting from such injury, under statutes providing "that no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction"; and "that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought

by the party injured during his or her life, the widow of any such, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Such statutes do not give an independent right of action for the death of the husband which he cannot release in his lifetime.

C. M. Clement and S. P. Wolverton, for the appellant.

B. F. Junkin, J. C. Bucher, and J. S. Kline, for the appellee.

227 GREEN, J. The plaintiff's husband was injured in a collision on the defendant's road in November, 1890. He died of Bright's disease in September, 1891. He was more or less infirm in physical health during the intervening period, being part of the time able to attend to his business and part of the time unable. Shortly after his injury he settled with the defendant for all claims and demands on account of the accident, and executed an absolute release of all demands under seal for the sum of three hundred and fifty dollars, which was duly paid to, and accepted by, him. The evidence indicates very strongly that the cause of the death was Bright's disease and not the injury, but that question does not arise because the learned court below ruled that the plaintiff could not maintain the action on account of the release executed by her husband, and gave a binding instruction to the jury to find for the defendant. Substantially, the question arising is, whether the wife, under our existing legislation, and upon the facts of this case, has an independent right of action for the death of the husband which the husband could not release. It is contended for the appellant that she has such a right of action, and that, therefore, the husband's release could not affect it. The solution of the question depends upon the construction to be given to our two acts of assembly of April 15, 1851 (Pub. Laws, 674), and April 26, 1855 (Pub. Laws, 309).

The act of 1851 provides as follows:

Sec. 18. That no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.

Sec. 19. That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any **228** such deceased, or, if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.

It will be observed that in both these sections the right of action conferred is for the death of the party injured. The eighteenth section provides for the case of a party injured who has brought an action for his injury, but subsequently dies, and directs that in such case the action shall not abate by reason of the death but shall survive to his personal representatives. Section 19 provides that if no action has been brought for the injury during the life of the party injured, the widow, or, if there is no widow, the personal representatives may maintain an action and recover damages for the death thus occasioned. Thus both classes of cases are provided for, the one, where an action was brought by the injured party during his life but the plaintiff died pending the action, and the other where no action had been brought at the time of the death of the party injured. While it is very true that the injured party could in no circumstances recover damages for his own death, yet it is equally true that the cause of action provided for by both sections is death resulting from injuries. The act did not undertake to give a cause of action to the party injured for the injuries he had sustained, because such a right of action already existed independently of the act. Hence it cannot be argued that the intention of the eighteenth section was to give one right of action to the party injured and another and independent right of action for the same injury to his widow. The cause of action is the same in both sections, to wit, the death of the party, the only difference being that the eighteenth section provided for an action already pending, that it should not abate but should survive to the personal representative, and the nineteenth section provided that in case no action had been brought before the death of the party, an action might be brought by the widow, or, if there was no widow, then by the personal representatives. The remedy given to the widow by the nineteenth section was, of course, a new remedy which had no previous existence. This we held in the case of *Fink v. Garman*, 40 Pa. St. 95, and again in *Birch v. Pittsburg etc. Ry. Co.*, 165 Pa. St. 339, in the latter of which we said: "While grounded on the same 'unlawful violence or negligence' for which the injured party had a common-law right of action in his lifetime, the statutory ²²⁹ right, given by the nineteenth section, is conditioned upon the concurring facts that the injured party's death was occasioned by violence or negligence, and that no suit for damages was brought by him." In the foregoing case, the party injured, Mrs. Taylor, had brought an action in her lifetime to recover damages for the

injury, but died pending the action and before trial. Thereupon an amended statement was filed, alleging her death and praying to substitute her executors. To this the defendant pleaded that the cause of action survived to the persons named in the act of 1855, and therefore could not be maintained by the executors. But we held that it did survive to the executors under the eighteenth section of the act of 1851. As to this we said: "It follows from what has been said that the substitution of Mrs. Taylor's executors as plaintiffs, in the action commenced by her, was fully authorized, and they should be permitted to prosecute the same to final judgment and satisfaction, notwithstanding the fact, averred in their amended statement, that her death was occasioned by the defendant company's negligence. In the circumstances, their substitution was clearly warranted by the eighteenth section of the act of 1851." In substance, this was a decision that, although death resulted from the injury, the right of action survived to the executors of the decedent and was not transmitted to the other parties named. It is true an action had been brought by the injured party in that case, and here no action had been brought by the person injured before his death, but he had exercised his control over the right of action at a time when he alone had the whole right, with the same effect as if he had brought an action and had prosecuted it to judgment and satisfaction. The basis of the action is the negligence of the defendant. When the injured person survives, the sole right of action is vested in himself alone. If he brings an action, and it is tried and results in a verdict and judgment for the plaintiff, which is paid, it must be conceded that this is the end of the case. The defendant's negligence has been tried and adjudged, and, when the judgment has been discharged by payment, it has been satisfied for all purposes. The consequences of the transgression have been suffered and the penalty paid. We cannot consider, and it has not been so decided, that in this contingency there may be another suit brought for another result of the same act of negligence. The acts we are considering ²³⁰ do not confer any such right, nor any right to recover as upon an additional cause of action. In other words, without these acts a cause of action for a specific act of negligence would have died with the person and there could then be no recovery by anybody. But that consequence of the existing state of the law it was desired to avert, and, under the acts, the action does not die, but survives to certain persons named. But it is an action for the same injury, and upon the basis of the same negligence. The acts accomplish the preserva-

tion of a right of recovery, but they do not give, or assume to give, another and additional remedy to other parties for the same injury. If they would bear such a construction, it would follow that by force of the acts there was a right to recover for the injuries to the husband, considered only as injuries to himself, and in addition to that a new and other and independent right of action to the widow in her own right, and for her own benefit, and for the injury to herself. No such purpose is avowed in the act, and no such meaning is within its language.

We do not think the act of April 26, 1855 (Pub. Laws, 309), affects this view of the subject or makes any change in the fundamental character of the previous legislation. It simply enlarges the designation of the persons entitled to recover damages for an "injury causing death" so as to embrace children or parents of the deceased, and expresses the mode of distribution of the damages recovered.

The right of action was in its origin the sole property of the husband, and, of course, subject to his control. If he exercised it and conducted it to verdict, judgment, and satisfaction in the courts, that was the end of it. Neither he nor anyone else could maintain a second action for the same injury. So also he could compound it, and could adjust the amount to be received from the offending party, and could agree that the amount received should be a full solatium for the injury and the damage sustained. That would be a necessary incident to his ownership of the right of action. Such an adjustment would be the full equivalent of a verdict, and judgment in an adversary proceeding. In either event the remedy would be exhausted. It would have to be conceded that this must be so, if subsequently to the adjustment, some other and more serious consequence resulted from the injury than any that was anticipated when the ²³¹ settlement was made, and we know of no reason why this would not be true when such ulterior consequence was the death of the party injured.

The very question we are considering has been adjudged in the queen's bench in England in the case of *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555. The English statute of 9 & 10 Victoria, chapter 93, is almost precisely like our act of 1851, and was probably the model upon which our act was framed. In the case referred to, the husband had sustained an injury on the defendant's road, and had subsequently settled with the defendant and executed a release of all damages arising from the injury, and afterward died. The defendant pleaded the release to which the plaintiff demurred. In disposing of the demurrer, Blackburn, J.,

said: "I think the plea is a good plea. The question turns upon the construction of section 1 of 9 & 10 Victoria, chapter 93. Before the statute, the person who received a personal injury, and survived its consequences, could bring an action and recover damages for the injury, but if he died from its effects then no action could be brought. To meet this state of the law 9 & 10 Victoria, chapter 93, was passed, and 'whenever the death of a person is caused by a wrongful act and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable for an action for damages, notwithstanding the death of the party injured.' Here, taking the plea to be true, the party injured could not "maintain an action in respect thereof," because he had already received satisfaction. Then comes section 2, which regulates the amount of the damages and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action. . . . The intention of the enactment was, that the death of the person injured should not free the wrongdoer from an action, and in those cases where the person injured could maintain an action his personal representative might sue."

Lush, J., said: "I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for ~~the~~ the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, *Actio personalis moritur cum persona*, would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer."

The English statute is somewhat broader than ours, because it is not limited to cases in which an action had been brought by the injured party and he had died pending the action, nor yet to cases in which no action has been brought by the injured party in his lifetime, and the remedy is given without qualification in all cases. The second section authorizes the jury to give such damages "as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." That is, damages may be had for the death as declared in our nineteenth section of the act of 1851, but yet the person injured has such a right in

the cause of action as that he may release the offending party from all damages. The assignments of error are not sustained. Judgment affirmed.

RAILROADS—RELEASE.—If a statute makes the killing of a passenger by a railroad through gross negligence punishable by a penalty payable to the widow and children or next of kin, such passenger cannot release the corporation from liability, and therefore his agreement to do so cannot bar an action brought for his death by an administrator for the benefit of the persons entitled to the penalty: *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66; 44 Am. St. Rep. 835.

SMITH v. WILDMAN.

[178 PENNSYLVANIA STATE, 245.]

JURISDICTION—PROBATE COURT.—A decree of a probate court pronounced upon a subject over which it has no jurisdiction is null and void.

EXECUTORS AND ADMINISTRATORS—PROBATE SALES—STATUTE OF LIMITATIONS.—An administrator's sale of the real estate of a decedent directed by the probate court for the payment of his debts barred by the statute of limitations is null and void.

EXECUTORS AND ADMINISTRATORS—PROBATE SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies to probate sales and disappointment in the title is no ground for relief. The purchaser is bound to see that the proceedings are sufficiently regular to authorize the sale.

EXECUTORS AND ADMINISTRATORS—PROBATE SALES—COLLATERAL ATTACK.—An unauthorized decree of a probate court for the sale of a decedent's lands is not valid until reversed in the regular course of appeal, but may be attacked in a collateral suit by or against any party claiming under that decree.

EXECUTORS AND ADMINISTRATORS—PROBATE SALES—JURISDICTION—COLLATERAL ATTACK.—In proceedings in a probate court to sell real estate for the payment of a decedent's debts, the court must be satisfied independent of the facts stated in the petition, before making an order of sale, that there are unpaid debts properly chargeable upon the real estate of the decedent, and that the real estate described in the petition is bound by the lien of such debts, and that it is necessary to have recourse to the land to pay them, otherwise the sale is unauthorized and subject to collateral attack.

F. P. Iams, J. W. Ray, H. B. Artell, and C. C. Brock, for the appellants.

J. E. Sayers and W. A. Hook, for the appellees.

248 WILLIAMS, J. The question whether, under all the circumstances surrounding the parties to this action, it is, or is not, conscionable on the part of the plaintiffs is not now before us. The evidence inclines us to think that the circumstances, while

not amounting to an estoppel at law, are entitled to consideration in foro conscientiae. But the assignments of error present only a dry question of law to us. Was the orphans' court sale of the real estate now in controversy, made in October, 1872, operative to pass a title to the purchaser? This must depend upon whether the orphans' court had jurisdiction over the land to order its sale, and upon the legal effect of the order and of the decree of confirmation.

Smith died in the spring of 1862 leaving to survive him a wife and five children. He was at the time of his death the owner of the farm which is the subject of this action. No administrator was appointed. His sister, Mrs. Lippencott, had lent him money to the extent of five hundred dollars or thereabouts which he had paid upon the land when he obtained his deed. For this money no security was given by him. He had not repaid it at the time of his death, and the widow and such of the children as were of age made some arrangement with Mrs. Lippencott under which she took the farm in payment of her debt. When she came to sell it, the purchaser objected to the title, for the reason that two of the five children were still minors and their title had not been secured. To remedy this defect in the title, and ²⁴⁰ for no other purpose, an administrator upon the estate of Smith was appointed in 1872, ten years after his death, and an application at once made for leave to sell the farm at administrator's sale for the payment of the debt which had been due to Mrs. Lippencott. The land had been relieved from liability for this debt at the end of five years after the death of the decedent by the operation of the act of February 24, 1834. The debt had been barred by the statute of limitations at about the same time; but without any inquiry as to the time of Smith's death or the time when the alleged debt was contracted an order of sale was granted, a sale was made by the administrator to Mrs. Lippencott's husband, the price applied upon her debt, and the sale duly confirmed by the orphans' court. The defendant holds under this sale and is in actual possession. The plaintiffs bring this action as heirs at law of Smith, their father, and claim to have title by descent, and the operation of the act of 1834. The defendant replies the orphans' court sale and the conclusive character of the decrees of that court under which the sale was made and confirmed. The learned judge of the court below took the defendant's view of the case, and held the decree of the orphans' court to be conclusive, not only of the regularity of the proceedings, and the power of

the administrator to sell and make a deed, but also of all claim by the plaintiffs upon the land.

In support of this doctrine the defendant cites *Sager v. Mead*, 171 Pa. St. 349, and kindred cases, in which this court has declined to investigate the regularity of the preliminary proceedings, after an administrator's sale has been actually made under an order of the orphans' court, been regularly returned to the court and approved by it. The leading case upon this subject is *McPherson v. Cunliff*, 11 Serg. & R. 422; 14 Am. Dec. 642. In that case, the administrators were appointed soon after the death of the decedent in 1795, the sales complained of were made in the same year and in 1796, for the payment of debts and the support of minor children. Some minor irregularities in the proceedings were alleged, but the chief objection made to the sale was that decedent had a living wife in Ireland at the time of his marriage to the mother of his children in this country of which nothing had been known when the sales were ordered and confirmed. This court held in an elaborate opinion by Justice Duncan that the ²⁵⁰ title taken by the purchaser was the title of the decedent, and that the court had jurisdiction over the subject matter and its decrees were therefore conclusive upon the subject covered by them. The reason for so holding he stated in these words: "The principle on which I hold the sentence or decree of the orphans' court conclusive is, that it is a general rule of our law that when any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former and must give credit to it."

This makes the conclusiveness of the judgment or decree depend upon the jurisdiction of the court pronouncing it; and the converse of this proposition is equally clear that a decree of any court is a nullity which is pronounced upon a subject over which the court has no jurisdiction. This is elementary law. It was no new doctrine announced by this court in *Torrance v. Torrance*, 53 Pa. St. 505, when we said, "Want of jurisdiction in the orphans' court is as fatal to its proceedings as to those of any other court." It is not indispensably necessary that the want of jurisdiction should appear affirmatively on the record. Ignorance of the law excuses no man. If an orphans' court should entertain a petition in divorce, hear the testimony, and make a decree, the whole proceeding would be a nullity for want of jurisdiction, but it would be necessary to go behind the record and consult the

statutes before the want of jurisdiction would appear. In *Torrance v. Torrance*, 53 Pa. St. 505, the executor presented his petition to the orphans' court for leave to sell real estate for the repayment to himself of money paid to a legatee, and for the payment to another legatee of a judgment recovered by him against the executor for a balance due him upon his legacy. The legacies had been charged by the will of the testator on certain real estate. The court, without inquiry, directed the sale, and subsequently made a decree of confirmation, and the deed was delivered. But in an action of ejectment we held the sale to be void. The court had under the will no jurisdiction over the land, and therefore its decree was without conclusiveness and void. None of the facts that avoided the sale appeared on the record, except the fact that the sale was sought in order to pay legacies. The terms of the will and the want of statutory power to sell for such a purpose had to be sought ²⁵¹ outside the files of the court and the recitals upon its dockets. How does this doctrine apply to the case now before us? The statute gives the orphans' court power to authorize the administrator to make a sale of the real estate of a decedent in order to pay debts that cannot be paid out of the personal property. The administrator has no power over the land by virtue of his office. The land is made assets in his hands only when this becomes necessary for the payment of debts, and he must go to the orphans' court for leave to sell. He must satisfy that court that there are unpaid debts that are properly chargeable, under the law, to the land because the personal estate is insufficient to pay, and the court thereupon authorizes him to make the sale. If there are no debts, he cannot sell, nor can the court give him power to sell, unless it be for some other statutory reason. The existence of debts is a jurisdictional fact. In this case, the debt was not secured by lien, and under the act of 1834 it had ceased to be chargeable to the land, but that had passed to the heirs at law absolutely free and discharged from it. It was not in the power of the administrator, or of the court, or of both together, to defeat the positive provisions of the act of 1834, or to fasten upon that land that had descended to the heirs this debt which for more than five years had ceased to be a charge upon it.

This has been so often held by this court that it ought to be no longer debatable. In *Penn v. Hamilton*, 2 Watts, 53, it was held that although the debt might have been reduced to judgment against the administrators, yet, if not regularly revived, "the lien is lost, whether the land be in possession of devisees or

purchasers from devisees," after the lapse of five years. In *Quigley v. Beatty*, 4 Watts, 13, the single point ruled is stated in these words: "The debt of a decedent does not remain on his estate in the hands of an heir longer than seven [now five] years." The statute was characterized in *Kerper v. Hoch*, 1 Watts, 9, as a statute of repose, and the lapse of time fixed as operating to discharge the land from the debts of the decedent, whether in the hands of purchasers, heirs, or devisees. The last case was cited with approval in *Hemphill v. Carpenter*, 6 Watts, 32, and it was there further held that knowledge of the debts by the heir, or even a promise by the heir that the debt shall remain binding on the land, would not change the rule or ~~relieve~~ relieve against the statute: See, also, *Loomis' Appeal*, 29 Pa. St. 237; *Kessler's Appeal*, 32 Pa. St. 390; *Foster's Appeal*, 32 Pa. 495; *Buehler v. Buffington*, 43 Pa. St. 278. Such debts will not justify an order for the sale of real estate for payment of debts: *Pry's Appeal*, 8 Watts, 253, 258. The same rule is stated in *Bindley's Appeal*, 69 Pa. St. 295, with the further proposition that previous orders of sale within five years of the death of the decedent would not extend the lien of his debts beyond the period fixed by the act of 1834; and it was also held that "the principal intention of the twenty-fourth section of the act of 1834 was to promote security in titles in heirs, devisees, and purchasers. No admission, however solemn, will dispense with an action." The effect of a sale for payment of debts made after the five years had expired under an order that was granted before the end of the five years was suggested, but not decided, in *Craig's Appeal*, 5 Week. Not. Cas. 243, and *Bowker's Estate*, 6 Week. Not. Cas. 254. A sale under an order of the orphans' court passes only the decedent's title: *Kline's Appeal*, 39 Pa. St. 463; *Bickley v. Biddle*, 33 Pa. St. 276. The rule applicable to all judicial sales is caveat emptor as to the title acquired. It has been distinctly held that the rule applies to orphans' court sales and that disappointment in the title is no ground for relief: *Bashore v. Whistler*, 3 Watts, 490; *Bickley v. Biddle*, 33 Pa. St. 276; *Vandever v. Baker*, 13 Pa. St. 121. The purchaser at an orphans' court sale is also bound to see that the proceedings are sufficiently regular to authorize the sale: *Larri-mer v. Irwin*, cited in 4 Binn. 104. But all mere irregularities are cured by the decree of confirmation, which is an adjudication that the sale was made under the authority of the court: *Potts v. Wright*, 32 Pa. St. 498. But want of authority cannot be cured. Thus the confirmation of a sale ordered to pay legacies was held to be void for want of power to order the sale: *Torrance v. Tor-*

rance, 53 Pa. St. 505. The law does not authorize any such proceeding. An unauthorized decree of an orphans' court for the sale of lands will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under that decree: *Messinger v. Kintner*, 4 Binn. 97; *Snyder v. Snyder*, 6 Binn. 483; 6 Am. Dec. 493; *Sager v. Mead*, 164 Pa. St. 125.

The plaintiffs have shown a title derived by descent from the decedent, which had been relieved from his debts under the act ²⁵³ of 1834 for more than five years. This was a title that the orphans' court had no power to take from them. They were the holders of an independent, and as to these creditors an adverse, title to the land, and stand in the same position, so far as the right to deny the jurisdiction of the orphans' court over their title, as would any other adverse claimant. The order of sale operated only on the land of the decedent; not on that of any other person. It is because the land is a part of the estate, and is liable for his debts, that the court is empowered to order a sale. When it is discharged from the debts by a positive statute, the orphans' court cannot subject it again to liability. The heirs, as the holders of a perfect title free from liability to all unpaid debts of their ancestor, are, as we have said, adverse claimants to the land. Their title is, therefore, beyond the power of the court, and they may assert it against the holder of the administrator's deed in any court in which its validity may be called in question. In conclusion, it is proper to say that the proceedings of the orphans' court in this case ought not to be followed. The court should be satisfied, before making an order for the sale of real estate, that there are unpaid debts properly chargeable upon the real estate of the decedent. That the real estate described in the petition is bound by the lien of the said debts; and that it is necessary to have recourse to the land to enable the administrator or executor to pay them. The most convenient way for presenting these facts to the court is to embody them in the petition, stating the date of the decedent's death, and whether the debts were at that time secured by mortgage or judgment. This practice would make such a blunder as was committed in this case impossible; it would make the duty of the purchaser easier of performance; and tend to the security and repose of titles in heirs and devisees as well as purchasers.

The judgment is now reversed and a *venire facias de novo* awarded.

STERRETT, C. J., dissenting. The real question which underlies this case is, whether a purchaser is bound to look beyond the jurisdictional averments expressly prescribed by the act of 1832 under which orphans' ²⁵⁴ court sales are made. The facts set forth in the petition in this case are precisely those upon which the orphans' court is empowered "to authorize sales of decedents' real estate for payment of debts." If this be sufficient, the sale made was within the jurisdiction of the court which made the decree, and collateral attack on the title thereunder is, by the express terms of the act, prohibited. *Prima facie* it is sufficient. If the legislature had thought it necessary to impose other conditions precedent to the exercise of jurisdiction, it would doubtless have done so; but, having specified these, the purchaser had a right to assume that they were the only essentials. While the better practice would certainly have been to have made the petition fuller, failure to do so was a mere irregularity which was cured by the decree of sale. It was not necessary that the purchaser should follow step by step the investigation of incidental details which it was the duty of the court to make. It was enough for him that the record showed those which the legislature had made the ground of its exercise; being an innocent purchaser for value, he was entitled to protection, not only from direct, but, with much more reason, from collateral, attack. Once concede that he must inquire into relevant facts outside those which the act requires the "application" shall "set forth," it will logically follow that he must inquire into the truth of petitioner's averments; for the court must be presumed to pass on all the essential facts, and may as readily make a mistake in respect of one set as of the other. If, in truth, there be no debt, a sale made by virtue of a decree of the orphans' court within five years after a debtor's death would, on this theory of construction, convey no title. The practical effect must be to seriously cripple an important branch of orphans' court jurisdiction, unsettle many titles, bought for value in good faith, and bring a flood of litigation.

The fifty-seventh section of the act of March, 1832, regulating the manner of proceeding in the orphans' court, prescribes that it shall be on the petition of a person interested "setting forth" facts necessary to give the court jurisdiction, etc; the nineteenth section of the act of June 16, 1836, declares that such jurisdiction shall be exercised under the limitations and in the manner provided by law; and the proceeding under which the sale was

made in this case was in exact accordance with that prescribed by law.

255 This view is amply sustained by the authorities. The general principle which runs through all the cases is, that where a court of competent jurisdiction assumes to proceed, its record must set forth such facts as show jurisdiction; but it is not necessary that it set forth all the facts out of which jurisdiction springs. The application of this principle has given rise to the rule of evidence which is imbedded in the maxim, *Omnia prae-sumuntur rite esse acta donec probetur in contrarium*; and nothing but want of jurisdiction, apparent on the face of the record, or fraud, is recognized as a basis of question. The act of 1832, in which it was enacted that the orphans' court should be a court of record whose "decrees in all matters within its jurisdiction shall not be avoided collaterally in any other court," was simply declaratory of the law as it stood: *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634. In the leading case of *McPherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 642, it was held that a decree of sale made by the orphans' court was an implied adjudication of the legitimacy of those who had been named in the proceedings as children of the decedent, which the heirs at law were estopped from denying. "A purchaser," said Mr. Justice Huston, "is not bound to look whether the court is mistaken as to the facts of debts or children. . . . The court has decided that there were debts, and children to support, and no personal estate to pay debts and support the children; and, on that state of adjudged facts, they decree a sale. Beyond this the purchaser is not bound to look. The inquiries upon an ejectment are: Was there an administrator and an order to sell such as would authorize the administrator to make sale? . . . The irregularities or mistakes of fact after sale confirmed, moneypaid, conveyance executed, possession for twenty years, improvements of twenty times the value of the property, fair purchases deriving title by subsequent conveyances, cannot affect the purchasers." So it was held in *Painter v. Henderson*, 7 Pa. St. 48, on the same principle, that jurisdiction to award a purpart to the widow in partition could not be questioned collaterally. So in *Potts v. Wright*, 82 Pa. St. 498, the fact that the record did not show bond given by the administrator as required by statute was held to be an irregularity which was cured by the decree of sale. So it was held in *Shoenberger's Estate*, 139 Pa. St. 132, that the decision of the register, granting letters testamentary on a foreign will, implied 256 that he had judicially found the principal part of the estate

to be located in the county, and "it could not, therefore, be made the subject of collateral attack." So it was held in *Gilmore v. Rodgers*, 41 Pa. St. 120, that a mistake in the interest of the parties by the decree in partition was cured by the decree. In *Grindrod's Estate*, 140 Pa. St. 161, where an orphans' court sale was sought to be set aside on the ground that the petitioner was a minor without guardian or notice, it was refused because of a delay of ten years. "Something is due," said the court, "to the finality of judgments. The orphans' court after such a lapse of time has no power, unless, perhaps, in the case of fraud practiced upon it, to set aside the sale and vacate its own decree," and much less can "any other court." Numerous cases to the same effect might be cited illustrating the application of this principle, but these are enough to show the current of decision and sustain defendant's title. The application here was made by the proper party and set forth the existence of an unpaid debt, the insufficiency of personal estate, and the necessity of selling decedent's real estate in accordance with the directions contained in the act of 1832; and the decree of sale was an adjudication that these averments were facts and the sale necessary. There was nothing on the face of the record to put the purchaser on inquiry as to want of jurisdiction. He had no notice of the actual date of death; but the grant of letters and decree of sale justified him in believing it was recent. He had a right to presume that all things had been rightly done. If, in these circumstances, having in good faith paid the purchase money and retained the unquestioned and undisturbed possession for nearly twenty years, he can now be held responsible for the mistake of the court in its findings of fact, such sales are indeed, as was said by Mr. Justice Huston in *McPherson v. Cunliff*, Serg. & R. 422, 14 Am. Dec. 642, "snares for honest men."

On the other hand, these plaintiffs have no equity either for direct or collateral attack. Those through whom they claim, having certainly had at least constructive notice by advertisement, both of the sale and the account and distribution of the proceeds, must be presumed to have acquiesced, and it is now too late to question their validity. "Something is due," as was said in *Grindrod's Estate*, 140 Pa. St. 161, "to the finality of judgments." So far as appears, the property was sold for a full ²⁵⁷ price which went for the payment of the decedent's just debts; the sale received the sanction of a court of competent jurisdiction whose peculiar duty it was to protect under the law the rights of all parties interested; and yet these plaintiffs seek to

recover this property from defendant without repayment of the purchase money, with its interest, or to make compensation for the cost of valuable improvements. The injustice, to say the least, of this claim is manifest: *Klingensmith v. Bean*, 2 Watts, 486; 27 Am. Dec. 328; *Jacoby v. McMahon*, 174 Pa. St. 133.

The cases upon which plaintiffs rely are clearly distinguishable from the present. In *Pry's Appeal*, 8 Watts, 253, and *Oliver's Appeal*, 101 Pa. St. 299, no sales were made, but the appeals were from orders of sale. *Bindley's Appeal*, 69 Pa. St. 295, involved a question of distribution of the proceeds of a sale the validity of which was conceded; in *Maus v. Hummel*, 11 Pa. St. 238, there was enough on the face of the record to put the purchaser on inquiry which would have led him to the knowledge of the date of the debtor's death, and consequent want of jurisdiction; and *Grier's Appeal*, 101 Pa. St. 412, was ruled on the ground that the record failed to show compliance with a statutory requirement. In *Torrance v. Torrance*, 53 Pa. St. 505, so much relied on in support of the plaintiff's claim, want of jurisdiction appeared on the face of the record. The sale could not be sustained on the ground of the payment of debts, because there was no averment of such, nor on the ground of the payment of legacies, because of the want of proper parties; but, in deciding thus, this court was careful to note the alternative presumption of validity. "We are not unmindful," said Mr. Justice Agnew, "that general jurisdiction over the subject protects the decrees of the orphans' court from being assailed collaterally. But this is not such a case. Had the application been to sell the testator's estate for his own debts, their existence might be presumed; or had it been to sell the devisee's estate for the payment of legacies charged upon it, the want of authority in the executor to petition would have been but an irregularity." This analysis of cases, upon which plaintiffs' claim of title is mainly rested, shows that the right of collateral attack on decrees of orphans' courts was recognized because, and only because, of want of jurisdiction apparent on the face of the record; and that they afford no color for the proposition that ²⁵⁸ purchasers at orphans' court sales must, at their peril, inquire into relevant facts outside of those which the statute prescribes as the basis of jurisdiction.

It will thus be seen that the sale in this case was within both the letter and the spirit of the law, and that the defendant was an innocent purchaser for value entitled to protection.

Mitchell and Fell, JJ., concurred in the dissenting opinion.

PROBATE COURTS HAVE ONLY SPECIAL AND LIMITED JURISDICTION, and can exercise only such powers as are directly conferred or incidentally necessary to the execution of these powers: *Smith v. Howard*, 86 Me. 203; 41 Am. St. Rep. 537, and note; *Tracy v. Roberts*, 88 Me. 310; 1 Am. St. Rep. 394.

PROBATE SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies in its utmost vigor and strictness to an administrator's sale: *Lindsay v. Cooper*, 94 Ala. 170; 33 Am. St. Rep. 105, and note.

PROBATE SALES.—Collateral attack on is discussed in the note to *Cobb v. Garver*, 53 Am. St. Rep. 138.

FERGUSON v. ANGLO-AMERICAN TELEGRAPH COMPANY.

[178 PENNSYLVANIA STATE, 377.]

TELEGRAPH COMPANIES—CIPHER MESSAGE—DELAY—MEASURE OF DAMAGES.—If a message as delivered to a telegraph company for transmission is in cipher or unintelligible, except to the sender or the addressee, and the company has no information as to its character or purport, nor of its importance or urgency, the party injured by delay or mistake in the transmission of the message can recover nothing beyond nominal damages, or, at most, the price paid for transmission.

M. H. Todd, for the appellants.

S. W. Pettit, for the appellee.

381 **McCOLLUM, J.** This was an action for damages caused by the failure of the defendant to deliver promptly a telegraph message written in cipher. The evidence was to the following effect: Plaintiffs, on March 15, 1890, sent two cable messages in cipher, addressed to "Octorara," "Liverpool," the first of which ordered the purchase of fifty tons of soda ash, and the second ordered one hundred tons of the same, subject to shipment on the steamer *Kingsdale*. The first message was duly delivered to plaintiffs' agents, the second was not delivered until six days afterward. The steamer *Kingsdale* had sailed in the mean time. The delayed message reads as follows: "Bewail boarish, bewail bluster, provided steamer *Kingsdale*," and was interpreted to mean "purchase for our account 50 tons jarrow 55-56 per cent soda ash, 50 tons jarrow 48 per cent soda ash, provided shipment can be made per steamship *Kingsdale*." The plaintiffs had contracted for a resale of the entire one hundred and fifty tons, and, when the one hundred tons failed to arrive, they were compelled to pay a higher price to fill their contract, and thereby lost eight hundred and ninety-two dollars and seventy-two cents. The plaintiffs claimed that this was the measure of damages, but the court confined it to the sum paid for transmission of the mes-

sage. Was this ruling erroneous? It seems that the question now presented has not been decided by this court. It has been frequently considered in many of the courts of our sister states and in England, and the great preponderance of authority is in accord with the ruling of the court below. The ³⁸² rule on this subject is stated in 25 American and English Encyclopedia of Law, 842, 843, as follows: "The rule already set out as to the measure of damages confines the plaintiff's recovery, in actions against the company for negligence, to such as may fairly be supposed to have been in contemplation of the parties at the time of making the contract. This being true, it follows as a logical and necessary sequence that where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company had no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages or at most the price paid for transmission. And this is the rule which has been adopted by the English and American courts almost without exception." Many decisions of the courts of this country and England are cited as sustaining the rule above stated. The numerous decisions of the courts of many states will be found to be opposed to the decisions of the courts of only three states, those of Virginia, Georgia, and Alabama. Florida has recently reversed an earlier case, and thus joined the majority of the states on this question. The reasons advanced in support of the decisions which support the ruling of the court below have been various, the one most commonly applied being the rule of *Hadley v. Baxendale*, 9 Ex. 341. It is earnestly contended by the appellants that the rule of *Hadley v. Baxendale*, 9 Ex. 341, has no application to the case in hand, that the word "contemplate" is there used as contradistinguishing what is proximate and direct from what is remote and speculative, as in *Pennypacker v. Jones*, 106 Pa. St. 237, and *Adams Express Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382. They also call our attention to the fact that the view of *Hadley v. Baxendale*, 9 Ex. 341, contended for by the defendant, has been unsuccessfully urged upon this court at least twice before, namely, in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, and *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, and that therefore this question is not an open one.

We do not concede that the rule of *Hadley v. Baxendale*, 9 Ex. 341, has no application to this case, nor that the decision of this court in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am.

Dec. 751, or in *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, is opposed to the ruling of the court below. The message in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, disclosed to the agent of the company the nature of the business to which it related, and there ^{was} was uncontradicted evidence that the sender "notified the operator that he would look to the company for damages if they failed in transmitting the message." In *Telegraph Co. v. Landis*, 21 Week. Not. Cas. 38, there was enough on the face of the message "to indicate to the operator that it referred to sheep, to be shipped to Philadelphia and their price." It was a case, not of delay, but of error in transmission, and Paxson, J., speaking for this court said: "It seems reasonable that where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company on its guard. A delay of a day, or even a few hours, might cause a heavy loss." This suggestion is applicable to the case now before us and in harmony with the view taken in *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554, in which the court said: "Aside from the reasons which support the rule of damages in *Hadley v. Baxendale*, 9 Ex. 341, there is here a question of public policy to which we could not shut our eyes if we were in doubt upon the question. Upon any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it or a total failure to deliver it, the door is open to unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They may construct any meaning they choose, and, upon the meaning thus constructed, they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit." That the measure of damages contended for by the appellants might produce such results is obvious. Under it a telegraph company may receive for transmission a cipher message which on its face is absolutely unintelligible to them, and was intended by the sender to be so, and for the slightest delay in transmitting it they may be charged with damages which cannot reasonably be supposed to have been in the contemplation of both parties when they received it. Surely such a message furnishes no tangible ground for an inference that it relates to an important business transaction, or that the slightest delay in the delivery of it might subject the company to liability for such damages as are claimed in this case. In *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17

Am. Rep. 452, Dixon, C. J., said: "It cannot be said ³⁸⁴ or assumed that any amount of damages or pecuniary loss or injury will naturally ensue or be suffered according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling or unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation at the time of making the contract that any particular damage or injury would be the probable result of a breach of the contract on his part." To subject the company to the same liability for mistake or delay in the transmission of such a message that it might be subject to for a like mistake or delay in the transmission of an intelligible message would open the door to the perpetration of fraud, and disregard the well-settled rule of *Hadley v. Baxendale*, 9 Ex. 341. We find nothing in *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382, or in *Pennypacker v. Jones*, 106 Pa. St. 237, which can be considered as a repudiation or qualification of that rule, or in the way of its application to the case at bar. For the reasons above stated, we concur in the ruling of the court below.

Judgment affirmed.

TELEGRAPH COMPANIES—CIPHER MESSAGES—DAMAGES FOR DELAY IN DELIVERY.—The liability of a telegraph company for failure to transmit and deliver a message written in unexplained cipher, or in language unintelligible except to those having a key to its hidden meaning, is for nominal damages, or, at most, for the sum paid as the price for its transmission and delivery: *Western Union Tel. Co. v. Wilson*, 82 Fla. 527; 37 Am. St. Rep. 125, and note with the cases collected. See, also, the note to *Hill v. Western Union Tel. Co.*, 46 Am. St. Rep. 785, and the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 783.

BUCHANAN v. SUPREME CONCLAVE OF THE IMPROVED ORDER OF HEPTASOPHS.

[178 PENNSYLVANIA STATE, 465.]

ASSOCIATIONS—INCAPACITY OF MEMBER—RIGHTS OF BENEFICIARY.—A beneficiary named in the certificate of insurance of a member of a beneficial association who is insane or otherwise incapacitated from attending to business, is entitled to pay the assessments levied against such member, and if, after notifying the association of the incapacity of such member and requesting it to notify himself instead of the member of all assessments levied against the latter, the association fails to give him such notice, it cannot forfeit the membership for nonpayment of assessments.

Assumpsit upon the benefit certificate of D. H. Buchannan, a member of the Tarentum Conclave of the Supreme Order Heptasophs, whose membership therein was declared by the order forfeited for the nonpayment of an assessment. Judgment for plaintiff. Defendant appealed.

J. A. Langfitt and S. A. Will, for the appellant.

J. S. Young, A. M. Robb, and S. U. Trent, for the appellee.

⁴⁷⁰ Per CURIAM. We find no error in this record. For reasons given by the learned trial judge, in his opinion refusing a new trial, the judgment should not be disturbed.

Judgment affirmed.

The opinion referred to was as follows:

⁴⁶⁵ "SLAGLE, J. This was an action upon a benefit certificate issued to D. H. Buchannan, and made payable to the plaintiff, his daughter. A verdict was rendered in favor of plaintiff. A motion for a new trial was made by defendant, for which a number of reasons have been assigned. We think there was sufficient evidence for submission to the jury of the questions of fact, and only two of the reasons assigned need to be considered. The fourth assignment is as follows: 'Witnesses for plaintiff having testified that D. H. Buchannan did not to their knowledge receive his copy of the Advocate in September, 1894, the court erred in charging ⁴⁶⁶ the jury that mailing the said Advocate at Baltimore to the proper address of D. H. Buchannan was prima facie evidence that he received it, but that that evidence might be rebutted.' The court did not instruct the jury as stated. It was contended by plaintiff that the notice published in the Advocate was not the notice required by the constitution of the order; that it was a notice addressed to the conclaves, and should have been addressed to the members. The court held that the notice was

sufficient in form. It was further contended that there was not sufficient evidence of mailing. The court submitted the question to the jury as follows: 'Now was this placed in the postoffice properly addressed to Mr. Buchanan at the place of his residence, of which the order had notice upon their records? If so, then notice was given.' Counsel for plaintiff contended that she might show that it had not been received. It would probably have been better to have said that it was immaterial whether it had been received or not, the court having practically instructed the jury that there was no evidence to rebut the presumption that it had been received, and may have fallen into an error in saying, 'However, if, under all the evidence in the case, you are not satisfied that this notice was not properly sent and received, the defendant has not made out a case of suspension.' But this certainly could have done no harm as the case was submitted to the jury on the question which is the subject of the fifth assignment, as follows: 'The court erred in its charge to the jury in stating that Mabel Buchanan, the plaintiff, had an interest in the benefit certificate sued on, and that she was entitled to notice of the calling of assessments, for the nonpayment of which D. H. Buchanan was suspended, if said D. H. Buchanan was mentally incapable of receiving or of understanding the meaning or effect of said notice, there being no provision in the law of the defendant entitling the plaintiff to any such notice in this case.' This is not in the language of the court, but is substantially correct. There was some evidence of the incapacity of Mr. Buchanan at and before the assessment of September, 1894, was made, and that it continued until his death. It was also in evidence that before the assessment was made Mabel Buchanan, the beneficiary, had written to the financial officer to whom all assessments were payable, referring to her father's condition, stating that he was careless and liable to neglect ⁴⁶⁷ them (the assessments), that she had at various times paid them, and asking, 'If you find Mr. Buchanan won't pay them, please let me know so that I can make an effort to do so.' In view of this evidence, the court instructed the jury that Mabel Buchanan had an interest in that certificate. It is true that it is one that was subject to the voluntary control of her father; therefore she had certain rights, and, if her father was insane or incapable of attending to business, she had a right to keep this certificate alive, and when she notified the proper officer, if she did, of her intention to keep it alive, notwithstanding what her father might do, she had a right to do it. If he was capable of acting, no action of hers would keep it alive, because he had the

power to destroy her rights at any time. But if he was incapable of acting, she would have the right to say to this officer of this society, 'My father is not capable of attending to this matter, and I will pay these assessments until he is.' The conclusion of the whole matter was stated as follows: 'Now if her father was in such actual condition as to make him incapable of acting in this matter, she, as the beneficiary, had a right to pay the assessments, and, when she asked to be informed of any assessments that were due, I think it was the duty of the officers to notify her before any suspension was made, and, if they neglected to do it, then they could not work any suspension of this certificate.' This is the substantial testimony in the case. There is abundant authority for the position of the plaintiff's counsel that where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract, and failure to pay within the time designated renders the certificate null and void, and that where there is no provision of the contract which declares, expressly or by necessary implication, that sickness or insanity or similar incapacity shall excuse the payment of any assessment on the day it is due, the courts will not grant relief against such contingency. This is simply to hold that every one is bound by his contract deliberately made. However, the reason for this seemingly hard rule is indicated in Bacon on Beneficial Societies, section 384, where the author says neither insanity, sickness, nor absence is an excuse for nonpayment of assessments, the payment being an act that can be performed by the member or by some other person. ⁴⁶⁸ This marks the distinction between this case and those to which he finds the rule to have been applied. The statement of the text is possibly too broad, but certainly anyone related to the member or interested in his estate may come to his relief under such circumstances, and especially when he is named as his beneficiary under his certificate. The beneficiary has an interest in the certificate, and although it does not become absolute until the death, it is an actually existing interest until annulled under the rules of the order. So long as it remains in force it belongs to him exclusively. Upon the death of a member it passes to the beneficiary as his own and not as representative of a member: *Hamill v. Supreme Council*, 152 Pa. St. 537.

"If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but that he would be bound to accept it. When the offer was made in advance, good faith required that the beneficiary should have the

opportunity to preserve her rights, not against the voluntary act of the member, but as against neglect caused by his inability to act. She was, therefore, entitled to notice upon proper request made. No notice was given, and it appears from the evidence that neither the plaintiff nor her mother had knowledge of the assessment, and if plaintiff had actual knowledge of the assessment, it would be fatal to her claim. This gives pertinency to the testimony of the plaintiff and her mother that they did not see or know of the notice by publication. The only other question is as to the party to whom the request for notice was made. Plaintiff's request was sent to the financier of the local conclave. He is the only officer with whom individual members come in contact. To him all assessments are paid, and the order should be bound by his acts. The question in this case seems to be new. We think the law ought to be and is as given to the jury, and a new trial must therefore be refused."

MUTUAL BENEFIT ASSOCIATIONS—RIGHTS OF BENEFICIARIES.—This question is fully discussed in the extended note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 786.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

OPPENHEIMER v. BANK.

[97 TENNESSEE, 12.]

APPELLATE PROCEDURE.—UPON AN APPEAL IN CHANCERY the whole case is open for examination, and the decree will be affirmed if found to be correct upon any ground, although incorrect upon the ground assigned for it by the chancellor.

NEGOTIABLE INSTRUMENTS.—INADEQUACY OF PRICE paid for negotiable paper may be so gross as to justify the conclusion that the purchaser is chargeable with notice of a fraudulent or defective title on the part of the vendor; but the purchase at a discount of twenty per cent does not necessarily show such a discrepancy between the amount paid and the commercial value of the paper as to charge the purchaser with notice of fraud in the obtaining of the paper by its original holder.

NEGOTIABLE INSTRUMENTS.—A STIPULATION IN A PROMISSORY NOTE to pay all reasonable attorneys' fees in case suit is brought to enforce payment does not destroy its negotiability.

NEGOTIABLE INSTRUMENTS.—A BONA FIDE PURCHASER of a negotiable instrument can recover thereon only the amount paid therefor with interest, where the instrument was fraudulent in its inception and without consideration between the original parties.

McDearmon & Killough, Cooper & Harwood, and Neil & Deason, for Oppenheimer.

W. M. McCall and W. I. McFarland, for Bank.

20 McALISTER, J. Complainants filed this bill to enjoin the defendant bank from prosecuting three several suits before a justice of the peace, for the collection of certain promissory notes. It is charged in the bill that said notes were procured by fraud and are without consideration, and that the bank received the notes from the payees with actual or constructive notice of the fraud. It is further charged said notes were not negotiable, for the reason that each contained a stipulation for the payment of reasonable attorney's fees, and that said bank is not protected

in its title to said notes as an innocent holder for value in due course of trade. The chancellor, upon final hearing, was of opinion that the defendant bank purchased said notes without actual²¹ or constructive knowledge of the fraud, but held that the stipulation in respect of attorney's fees destroyed the negotiability of said instruments, and thereby defeated the claim of said bank; that it was an innocent holder for value within the meaning of the law merchant. The court decreed that said notes had been procured by fraud and were void in the hands of defendant bank, and perpetually enjoined their collection. The bank appealed, and has assigned as error the action of the chancellor in adjudging said notes non-negotiable on account of the stipulation in respect of attorney's fees.

The facts out of which the present controversy has arisen may be briefly stated. The record discloses that Curtis Brothers were the proprietors of a patent churn, which they were engaged in selling in Gibson county. Complainants purchased of Curtis Brothers the exclusive right to sell this churn in the state of Louisiana and certain counties of Mississippi, for which they agreed to pay the sum of two thousand dollars, evidenced by four notes, each for the sum of five hundred dollars, and payable, respectively, in seven, eight, nine, and ten months from date. The following is a specimen of the notes in controversy, viz:

"Trenton, Tenn., June 3, 1889.

"Nine months after date we promise to pay to the order of Curtis Bros., or bearer, the sum of five hundred dollars, negotiable and payable at the Exchange Bank of Trenton, Tenn., for value received. The drawers and indorsers severally waive presentment²² for payment, protest, and notice of protest and nonpayment of this note, and, in case of suit, agree to pay all reasonable attorney's fees for collecting the same.

"\$500 due February 3, 1890.

"L. OPPENHEIMER,

"C. T. LOVE,

"R. F. ROSS,

"H. R. CAMP."

On the 27th and 28th of June, 1889, three of these notes were purchased by the defendant bank at a discount of twenty per cent—that is to say, the bank paid twelve hundred dollars for the three notes of the aggregate face value of fifteen hundred dollars. H. R. Camp, one of the signers of the note, was in the employment of Curtis Brothers in the capacity of salesman, and nego-

tiated the sale to Oppenheimer of the exclusive right to sell this churn in Louisiana and Mississippi. It was agreed between the original parties, at the time the notes were executed, they were not to be transferred, and were alone payable out of the profits of the new business. Curtis Brothers, Camp, and Ames, soon after the execution of the notes, left the state clandestinely, and their whereabouts is unknown. The proof abundantly shows that Curtis Brothers were in collusion with Camp, and that said notes were procured to be executed upon false and fraudulent representations, and, as between the original parties, there was a total failure of consideration. The defendant ²³ bank, however, relies upon the plea of innocent purchaser for value before maturity, in due course of trade, and without notice. Defendant's counsel insist that, complainant not having appealed from the ruling of the chancellor that the bank had no actual or constructive notice of the fraudulent conduct of the payees in procuring the execution of the notes, this question cannot be reopened in this court. But this position is manifestly erroneous, since, upon the appeal of the bank, the whole case is open for re-examination, and if the decree in favor of complainant is found correct upon any ground, although incorrect upon the ground assigned by the chancellor, we should affirm it.

The contention of learned counsel for complainant is, that the purchase of the notes in suit from strangers at a discount of twenty per cent, when the bank knew that Oppenheimer, one of the makers, was perfectly solvent, indicates knowledge of the fraud, or that the bank had such constructive notice as to put it upon inquiry. As said by this court: "When the indorsee takes negotiable paper before maturity under circumstances which might reasonably create a suspicion that it was not good—as where he buys a note on a solvent man, having less than one year to run, for three hundred and thirty-three dollars and thirty-three cents at one hundred and twenty-five dollars, with an agreement to pay twenty-five dollars more if collected without suit, he takes it at his peril and subject to the equities between the original parties": *Hunt v. Sanford*, 6 Yerg. 387; *Merritt v. Duncan*, 7 Heisk. 163; 19 Am. Rep. 612.

²⁴ Says Mr. Tiedeman, in his work on Commercial Paper, section 291: "It is said that inadequacy of price paid for negotiable paper may be so gross as to justify the conclusion that the purchaser is charged with notice of a fraudulent or defective title on the part of the vendor. And it has been held there was constructive notice of fraud or of some other equally effective de-

fense to the paper where the purchaser paid one hundred and twenty-five dollars for a note of three hundred and thirty-three dollars and thirty-three cents, fifty dollars for a note of three hundred dollars, five dollars for a note of three hundred dollars. On the other hand it has been held that the purchaser of a commercial instrument was a holder for value, and hence took it free from equitable defenses, when he paid one hundred dollars for a note of two hundred and fifty dollars, fifty dollars for a note of one hundred dollars, or twelve dollars and fifty cents for a note of twenty-five dollars. It is certain that a purely nominal consideration would not make the purchaser a holder for value. And it may be stated, subject to an explanation of terms, that an inadequate price always puts the person upon inquiry and may, certainly, along with other suspicious circumstances, charge him with notice of existing defenses. But every price is not inadequate which is less than the face value of the instrument purchased. Commercial paper of every kind has its commercial value, rising above or falling below par, according to the financial credit of the person liable on it. Only that price is inadequate which falls below the market value, and if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser ²⁵ had reasonable grounds for suspecting fraud or some other defense to the instrument. Each case must, therefore, stand on its own merits. One-half the face value may, under some circumstances, be a grossly inadequate price, while, under different circumstances, it may be greatly in excess of what the instrument is worth on the market": Tiedeman on Commercial Paper, sec. 291.

We think the rule laid down by Mr. Tiedeman is sound, and furnishes an intelligible basis for the determination of what constitutes inadequacy of price in the purchase of commercial paper. We cannot say, however, in view of this rule and the proof in the record, that there was any such gross disparity between the commercial value of the notes and the price actually paid, as to awaken suspicion in the minds of the officers of the bank of any infirmity in the paper. The proof shows that this bank was accustomed, during this time, to discount paper at rates varying from twelve to twenty-five per cent per annum, and that it had, prior to this time, discounted paper held by these payees on other solvent parties at such rates. It was also insisted in argument that H. R. Camp, one of the makers of the notes, negotiated the sale of this paper to the bank, and that this fact was sufficient to put the purchaser upon inquiry. Nothing can be predicated

upon this position, for the reason that it does not distinctly appear from the record whether it was Ames or Camp who sold the notes to the bank. The officers ²⁶ of the bank who purchased the paper are unable to state which of these parties conducted the transaction, and there is no other proof in the record on the subject. We hold, however, this feature unimportant in this case. We find no facts or circumstances in the record fixing the bank with knowledge, actual or constructive, of the fraudulent character of the paper, and the holding of the chancellor in respect of this proposition is correct.

The next question presented is, whether the stipulation in respect of payment of attorney's fees, written in the face of the note, destroys its negotiability and thus dismantles the note, allowing proof of fraud in its execution. The question presented has given rise to much judicial controversy, and the decisions announced in different states and jurisdictions are by no means reconcilable, and, since the question is one of first impression in this state, we shall, after a review of the authorities, adopt that view which most commends itself to our reason and judgment.

Mr. Tiedeman, in the work already cited (Tiedeman on Commercial Paper, sec. 28 b), says: "Bills and notes, particularly the latter, sometimes contain stipulations that, if not paid voluntarily, the drawer or maker will pay the attorney and collection fee. It has been much discussed what is the effect of such a stipulation upon the legal character of the instruments to which they are added. A few decisions maintain that the stipulation is in the nature of a usurious charge and avoids the ²⁷ whole transaction under the laws prohibiting usury": Citing *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Dow v. Updike*, 11 Neb. 95.

It may be remarked under this head that, in the case of *Parham v. Pulliam*, 5 Cold. 497, this court held that a stipulation in a note to pay attorney's commission for collecting is not usurious. Other decisions hold the stipulation to be void because it is in the nature of a penalty and tends to the oppression of impecunious debtors. But the avoidance of the stipulation on such grounds enables the courts to treat the stipulation as mere surplusage and hold the instrument to be negotiable notwithstanding": Citing *Sweeney v. Thickstun*, 77 Pa. St. 131; *Woods v. North*, 84 Pa. St. 410; 24 Am. Rep. 101; *Johnston v. Spear*, 93 Pa. St. 227; 37 Am. Rep. 675; *First Nat. Bank v. Bynum*, 84 N. C. 24; 37 Am. Rep. 604; *First Nat. Bank v. Gay*, 68 Mo. 23; 21 Am. Rep. 430; *Samstag v. Conley*, 64 Mo. 477; *First Nat. Bank v.*

Marlow, 71 Mo. 618; Storr v. Wakefield, 71 Mo. 622; First Nat. Bank v. Gay, 71 Mo. 627; Morgan v. Edwards, 53 Wis. 599; 40 Am. Rep. 781; Jones v. Radatiz, 27 Minn. 240; Witherspoon v. Musselman, 14 Bush, 214; 29 Am. Rep. 404; Myer v. Hart, 40 Mich. 517; 29 Am. Rep. 553; Bulloch v. Taylor, 39 Mich. 138; 33 Am. Rep. 356; Gaar v. Louisville Banking Co., 11 Bush, 182; 21 Am. Rep. 209.

"In a large number of cases, the stipulation is held to be valid, but because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability": Citing Sweeney v. Thickstun, 77 Pa. St. 131; Woods v. North, 84 Pa. St. 410; 24 Am. Rep. 101; Johnston v. Spear, 92 Pa. St. 227; 37 Am. Rep. 675; First Nat. Bank v. Bynum, 84 N. C. 24; 37 Am. Rep. 604; First Nat. Bank v. Gay, 63 Mo. 33; 21 Am. Rep. 430; Samstag v. Conley, 64 Mo. 477; First Nat. Bank v. Marlow, 71 Mo. 618; Storr v. Wakefield, 71 Mo. 622; First Nat. Bank v. ²⁸ Gay, 71 Mo. 627; Morgan v. Edwards, 53 Wis. 599; 40 Am. Rep. 781; Jones v. Radatiz, 27 Minn. 240.

"There are also other cases which not only recognize the validity of the stipulation, but also the negotiability of the paper in which it appears": Citing Dietrich v. Bayhi, 23 La. Ann. 767; Overton v. Matthews, 35 Ark. 147; 37 Am. Rep. 9; Smith v. Muncie Nat. Bank, 29 Ind. 159; First Nat. Bank v. Canatsey, 34 Ind. 149; Johnson v. Crossland, 34 Ind. 334; Smith v. Silvers, 32 Ind. 321; Wyant v. Pottorff, 37 Ind. 512; Hubbard v. Harrison, 38 Ind. 325; Walker v. Woolen, 54 Ind. 164; 23 Am. Rep. 639; Sperry v. Horr, 32 Iowa, 184; Seaton v. Scoville, 18 Kan. 436; 26 Am. Rep. 779; Howenstein v. Barnes, 5 Dill. 482; Heard v. Dubuque etc. Bank, 8 Neb. 10; 30 Am. Rep. 811; Farmers' Nat. Bank v. Rasmussen, 1 Dak. 57, 60; Wilson Sewing Machine Co. v. Moreno, 7 Fed. Rep. 806; Witherspoon v. Musselman, 14 Bush, 214; 29 Am. Rep. 406; Stoneman v. Pyle, 35 Ind. 103; 9 Am. Rep. 637. Indiana now prohibits by statute such stipulations in notes unless unconditional: Rev. Stats. 1876, 149. Mr. Tiedeman remarks that where the amount to be recovered as attorney's fees is explicitly stated in the instrument, it would seem that the sum of money to be recovered on the paper, with the attorney's fees added to the principal and interest, would be as certain as the principal and interest would be alone, for the interest continues to accumulate if the paper is not honored at maturity. When the exact ²⁹ amount of the fee is not stated, only reasonable fees can be recovered, and there may be some

ground for objecting to the negotiability of such an instrument. But it would seem that even such an instrument ought to be held negotiable, for the stipulation for reasonable attorney's fees renders the amount no more uncertain than the addition by the law merchant to the principal sum of the costs of protest and the taxed costs of the suit.

Mr. Randolph, in his work on Commercial Paper, volume 1, section 205, in treating this subject, says: "The effect of a stipulation for attorney's fees or costs of suit contained in a note has been the subject of much consideration, more especially in our western states. As an agreement and irrespective of usury laws and other statutory prohibitions, such a stipulation is in itself valid": Citing *Meacham v. Pinson*, 60 Miss. 217; *Brown v. Barber*, 59 Ind. 533; *First Nat. Bank v. Breese*, 39 Iowa, 640; *Garver v. Pontious*, 66 Ind. 191; *Mathews v. Norman*, 42 Ind. 176; *Sinker v. Fletcher*, 61 Ind. 276; *Smiley v. Meir*, 47 Ind. 559; *Maynard v. Mier*, 85 Ind. 317; *Miner v. Paris Exchange Bank*, 53 Tex. 559. "And the fees so stipulated for may be recovered by the holder of the notes, although not the original payee": Citing *Johnson v. Crossland*, 34 Ind. 334. "And where a stipulation of this sort is contained in a bill of exchange, it has been held to be embraced in the liability assumed by the acceptor": *Bank of British North America v. Ellis*, 2 Fed. Rep. 44; *Smith v. Muncie Nat. Bank*, 29 Ind. 158.

⁸⁰ "It may be said in general," says the author, "that such a stipulation for fees does not affect the negotiability of the note containing it, even though the stipulation be restricted to the case of suit being brought on the instrument": Citing 1 *Daniel on Negotiable Instruments*, 66; 2 *Parsons on Bills and Notes*, 147; *Dietrich v. Bayhi*, 23 La. Ann. 767; *Heard v. Dubuque Co. Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scoville*, 18 Kan. 433; 26 Am. Rep. 779; *Wilson Sewing Machine Co. v. Moreno*, 7 Fed. Rep. 806; *Adams v. Addington*, 16 Fed. Rep. 89; *Trader v. Chichester*, 41 Ark. 242; 48 Am. Rep. 38; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; 21 Am. Rep. 209; *Nickerson v. Sheldon*, 33 Ill. 373; 85 Am. Dec. 280; and citing also the Indiana cases, *Davidson v. Vorse*, 52 Iowa, 384; *McGill v. Griffin*, 32 Iowa, 445; 3 *Randolph on Commercial Paper*, secs. 1717, 1718; *Chitty on Contracts*, 770.

Says Mr. Daniel, in his work on Negotiable Instruments, section 62 a: "Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for the payment of a certain sum

of money at a certain time, and the additional stipulation as to attorneys' fees can never go into effect if the terms of the note or bill are complied with. They are, therefore, incidental and ancillary to the main engagement, intended to assure its performance or to compensate for trouble and expense entailed by its breach. At maturity, negotiable paper ceases to be negotiable in the full commercial sense of the term, as heretofore explained, though it still passes ³¹ from hand to hand by the negotiable forms of transfer, and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency, because when they cease to be current, they contain a stipulation to defray the expenses of collection. Such stipulations do not, we think, render such instruments usurious. The additional amounts are in consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money." The author states further that the cases sustaining the negotiability of such instruments consider that the stipulation in respect of attorneys' fees is valid, because it is an indemnification assured by the maker against the consequences of his own act, for, unless in default, he will not have to pay the additional amount; that it is consonant with public policy, because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit, and that it does not impair the negotiability of the instrument, for the reason that the sum to be paid at maturity is certain; that commercial paper is expected to be paid promptly; that, if so paid, no element of uncertainty enters into the contract; that it ceases to be negotiable in the full sense of the term, if not paid at maturity, and that the additional ³² agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay," etc: 2 Daniel on Negotiable Instruments, 3d ed., sec. 62.

This doctrine has received the indorsement of such eminent jurists as Mr. Justice Brewer, now an associate justice of the United States supreme court, who said, in the case of Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 781, viz: "It seems to us, therefore, a just conclusion that paper otherwise negotiable is not rendered non-negotiable by a stipulation for the payment of costs of collection, including attorneys' fees, in case suit is brought thereon." Justice Brewer cited with approval the case

of *Gaar v. Louisville Banking Co.*, 11 Bush, 180, 21 Am. Rep. 209, in which it was said, viz: "The reason for the rule that the amount to be paid must be fixed and certain is, that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but, when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence, anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until it had performed its office, cannot prevent its becoming negotiable paper."

²³ Upon a careful review of the authorities, we can perceive no reason why a note, otherwise endowed with all the attributes of negotiability, is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whose default the action was rendered necessary and the expense entailed. So far from such a stipulation discounting the negotiability of the instrument, we think, with Mr. Daniel, that it is an indemnification assured by the maker against the consequences of his own act; that it is consonant with public policy because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit.

We are, therefore, of opinion the decree of the chancellor adjudging said notes non-negotiable was erroneous. We hold, however, that, these notes being fraudulent in their inception and without consideration between the original parties, the bank will only be entitled to recover to the extent of the sum ²⁴ actually paid by it, to wit, the sum of twelve hundred dollars and interest. In other words, we hold there was a negotiation of the notes in due course of trade only to the extent of the amount actually paid: *Petty v. Hannum*, 2 Humph. 102; 36 Am. Dec. 303; *Holeman v. Hobson*, 8 Humph. 127; *May v. Campbell*, 7 Humph. 450; *Green v. Stuart*, 7 Baxt. 423.

The reason of this rule is thus stated by Mr. Daniel, viz: "When the execution of a bill or note has been induced by fraud, a different rule applies. The bona fide holder of it, for value and without notice, is undoubtedly entitled to be protected against a loss which would befall him if the party defrauded were permitted to set up the defense of fraud on the part of the payee against him. But it does not, therefore, follow that he may recover of such party the whole amount, when he has paid a less sum. For his protection and security against loss, it is only necessary that he should be paid back the amount which he was induced to give for the instrument by its appearance of validity, and, therefore, such amount is the limit of his recovery against the drawer or maker who was defrauded into the execution of the instrument. . . . The paper derives its vitality wholly from the circumstance that it has been obtained for value without notice by an innocent purchaser. For his protection, it is maintained in his hands as a legal obligation. The object of the law is to save him from loss, and, to do that, a recovery of the amount he may advance is all that ³⁵ can be required. To go beyond it would be inequitable and unjust to the party after that equally entitled to be protected from loss": 1 Daniel on Negotiable Instruments, sec. 758; Todd v. Shelbourne, 8 Hun, 510.

NEGOTIABLE INSTRUMENTS—WHAT ARE NOT.—A promissory note providing that in case suit is brought thereon the makers will pay such additional sum as the court may adjudge reasonable as attorney's fees is not negotiable: Kendall v. Parker, 108 Cal. 319; 42 Am. St. Rep. 117, and note. See, also, the extended note to Witherspoon v. Musselman, 29 Am. Rep. 406.

NEGOTIABLE INSTRUMENTS.—A bona fide purchaser of a negotiable instrument who pays less than its face value is entitled to recover its face with interest, though it was procured by fraud and could not have been enforced by the original payee: Kitchen v. Loudonback, 48 Ohio St. 177; 29 Am. St. Rep. 40, and note. Bona fide holders of negotiable notes taken for value before maturity can recover thereon, although they take them under circumstances which ought to excite the suspicion of prudent men: Second Nat. Bank v. Morgan, 165 Pa. St. 199; 44 Am. St. Rep. 652, and note.

NEGOTIABLE INSTRUMENTS.—Fraud in procuring the delivery of, is discussed in the extended notes to Willard v. Nelson, 87 Am. St. Rep. 458, and Bedell v. Herring, 11 Am. St. Rep. 309.

BANK v. SNEED.

[97 TENNESSEE, 120.]

LUNATICS.—A CONTRACT of a lunatic will not be set aside where it is entered into in good faith, without fraud or imposition, for a valuable consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original position.

LUNATICS.—IF A NEGOTIABLE INSTRUMENT is indorsed by a person while sane, and, upon its falling due and after he had become insane, he indorses another note given in renewal, the first note thereupon being surrendered and canceled, he is liable upon the second indorsement, if the payee of the note has no notice of the infirmity of the indorser.

CORPORATION, WHEN NOT CHARGEABLE WITH KNOWLEDGE OF ITS AGENT.—The fact that the president of a banking corporation knew of the insanity of an indorser of a promissory note does not charge the corporation with such knowledge, if he was not present when the indorsement was made, nor did he participate in the transaction out of which it grew, nor in any respect act as agent of the corporation in taking the note so indorsed.

William H. Randolph & Sons, for Bank.

Myers & Banks, for Sneed.

121 BEARD, J. The complainant in this cause, by its bill, sought to recover on two promissory notes, one for seven thousand five hundred dollars, dated October 3, 1892, and due at ninety days, and the other for three thousand dollars, dated October 22, 1892, and due at four months, made by W. A. Sneed, to the order of, and indorsed by, W. M. Sneed. At maturity these notes were presented for payment to the maker, and, this being refused, they were protested, of all which the indorser had due and legal notice. No defense was made by the maker of this paper, but Mrs. Neely, the executrix of W. M. Sneed, resisted recovery upon the ground that her testator was non compos mentis at the time he indorsed the same. Upon the trial, the chancellor pronounced a decree, not only against the maker, but also against the estate of the indorser. From this decree, the executrix alone prosecutes an appeal to this court.

The notes sued on were renewal notes, the last of two series made and indorsed by the same parties, the originals of which were discounted for the maker by the complainant bank in 1890. On all these notes W. M. Sneed was an indorser for the accommodation of W. A. Sneed, without any interest whatever in the proceeds of the discount.

So far as the facts are concerned, on which rests the contention of the executrix that her testator **122** was of unsound mind when he entered into these two contracts of indorsement, it is sufficient

to say that he had been, for more than twenty years, an active and prosperous member of the Memphis bar, and at the same time was interested in, and for a considerable period controlled, large enterprises outside of his profession. He was a man of energy, integrity, and sound business judgment, as the result of which he succeeded in acquiring a high reputation in the commercial community and in accumulating a large fortune. Unremitting attention to his various duties, according to the testimony of experts, finally brought on an attack of paresis—a disease which is described as attacking the organic brain structure—which, though slow in its progress, culminated, on or about October 15, 1892, in serious mental disturbance. Up to that time, we think it is clear from the record, whatever may have been the course of the disease, that he was in possession of his mental faculties, and fully able to bind himself by contract at the time he indorsed the seven thousand five hundred dollar note, of date the 3d of October. After the 15th, and up and including the 22d of that month, his mind was the subject of delusions, and, while he continued his daily visits to his office and his attention to his numerous business interests, yet we think the testimony in the case shows that, on October 22, 1892, when he indorsed the three thousand dollar note, he was, to a considerable degree, non compos mentis. Of this fact, however, the bank had no ¹²³ notice, when it canceled and delivered the old note, maturing that day, to the maker, and took from him this new note in its room and stead.

Upon this finding of the facts, the only question left for determination is, Can the estate of W. M. Sneed escape liability on this indorsement, on the ground that he was insane at the time of making it? It is conceded that, as a general rule, the contract of a lunatic may be avoided. To this, however, there is this well-recognized exception, that where a contract has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original positions, it will not be set aside by the courts: 5 Lawson's Rights, Remedies, and Practice, sec. 2389; 2 Pomeroy's Equity Jurisprudence, sec. 946.

It is said that such a contract is enforced against the party non compos mentis, not so much upon the idea that it possesses the legal essential of consent, but rather because, by means of an apparent contract, he has secured an advantage or benefit which cannot be restored to the other party, and therefore it would be

inequitable to permit him, or those in privity with him, to repudiate it: *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthiessen v. McMahon*, 38 N. J. L. 536.

The reports are full of cases which serve to illustrate this exception to the general rule. A few only will be referred to. In England, *Mounton v. 124 Camroux*, 2 Ex. 489, affirmed in 4 Ex. 489, is a leading case on this subject. In the opinion of the court, reported in 2 Ex. 489, it is said: "We are not disposed to lay down so general a proposition as that all executed contracts, bona fide, must be taken as valid, though one of the parties be of unsound mind. We think, however, that when a person comparatively of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot be afterward set aside, either by the alleged lunatic or those who represent him." This rule, or rather this exception to the general rule, has been recognized and applied by American courts in a great variety of cases. In *Wilder v. Weakley*, 34 Ind. 181, an action was maintained against the estate of a lunatic, on an account for whiskey, etc., sold to him in good faith and without knowledge of his lunacy. The court there said: "It is laid down by an elementary writer that if a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound mind, and any imposition appears to have been practiced upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void, as having been procured by fraud. But if the contract is a fair 125 and honest contract, and bears no symptoms of the infirmity of the mind of the party sought to be charged thereon, the courts will enforce it like any other contract. An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, and servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work, or the use of the horses, carriages, and servants."

In *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573, the plaintiff, as administrator of one Dorr, sought to recover the value of certain goods purchased by Dorr from the defendant, upon the ground that his intestate was insane at the time of the purchase. The testimony showed that the goods were unsuited to the object for which they were bought, that the price agreed upon exceeded

their market value, and that plaintiff had tendered them back to the defendants. On these facts the court found for the defendants, and, in its opinion, distinctly rested its conclusions upon this exception to the general rule. *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24, was a case where a bank, in good faith and without any knowledge of his infirmity, discounted a note for a lunatic, and paid him over the proceeds, and in it the same principle was applied.

While conceding that these cases were properly decided, and that the doctrine announced by them is ¹²⁶ sound, within proper limitations, it is insisted by appellant that, as all of them involve the purchase of property by or the loan of money to the lunatic, transactions by which something was added to his estate, they afford no authority for the contention of complainant in this case. As we understand these cases, their underlying principle is this: A lunatic or his privies will not be permitted to repudiate a contract from which he has received a clear benefit, where the other contracting party acted in good faith, without notice of the infirmity, and where, upon repudiation, the status quo of the parties cannot be restored. That this is a sound distinction we entertain no doubt. The question then is, Did Mr. Sneed, the insane accommodation indorser of this note, receive any benefit from this transaction, and, if so, in the event it is set aside, can the parties be placed back in their original positions?

In reply to the first part of this question, we say that it is apparent to us that he did receive a benefit, which was a consideration to him for his indorsement. He was of sound mind when he put his name on the back of the original note and of all the intervening renewal notes, including that which matured on the 22d of October. By his indorsement, he undertook that the paper would be honored by the maker when it fell due, and that, if dishonored, then, upon due presentment, nonpayment, and notice, the holder might proceed at once against him (the indorser): *Tiedeman on Commercial Paper*, ¹²⁷ sec. 259; 2 *Randolph on Notes and Bills*, sec. 742. This promise or undertaking, while conditional, was none the less a binding legal obligation, maturing on the same day as did the positive obligation of the maker. Now, when the bank surrendered the note which fell due on the 22d, and took in its stead the one in controversy, the effect of which was to give a further indulgence of four months, it conferred a valuable benefit upon both maker and indorser, and, in so far as this record discloses, the benefit or advantage which accrued to the indorser was quite as great as that to the maker—

because there is no suggestion here that the latter was either ready or able to meet the note that fell due that day. If he did not, then, upon proper steps being taken, it would have been the duty of the indorser at once to have discharged it.

We think there can be no doubt, in the light of the authorities, if the indorser had gone to the bank on the 22d, and by his solicitation had obtained a renewal of this paper, in order that he might be saved from making good his obligation which was likely to mature that day, and it had been granted, without notice of his infirmity, that neither he, nor his executrix, would be heard to say that as he was insane that day, and received no benefit in the way of goods purchased, or money borrowed, from the bank, there should be no recovery on his indorsement. And we can see no difference, as a matter of principle, between that case ¹²⁸ and the one presented at the bar, where the same result is accomplished for him by the maker, who has been placed in possession of the indorsed paper, in order that it might be used to that end. Not only was there a benefit conferred upon the indorser in this matter, but it is evident that it is impossible for the original positions of the parties to be restored. The old note has been extinguished and surrendered. It cannot be revived, and, if it could be, the day for payment and protest is long since past. The result is, that, unless the bank can hold his estate upon this renewal paper, which he contributed to induce the bank to take by indorsing it and intrusting it to the maker, and from which he derived the benefit already mentioned, then the bank must lose its claim against his estate, although it acted in good faith and in accord with sound business principles.

The diligence of counsel, supplemented by a careful search by this court, has been able to discover but one case that furnishes any analogy to the one at bar. This is the case of *Snyder v. Lanbach*, 7 Week. Not. Cas. 464, tried in a common pleas court of Pennsylvania, and reported in a law periodical published in Philadelphia.

As that publication is not generally accessible to the profession, it is thought proper to state the facts of the case and the conclusions of the court with some fullness: "On June 9, 1873, J. H. Lilly borrowed from ¹²⁹ the Dime Savings Institution of Bethlehem, the sum of fifteen hundred dollars, upon his promissory note to the order of Robert Yost, which was indorsed by Yost as an accommodation indorser. To secure Yost against his indorsement, Lilly, upon the same day, confessed judgment to Yost for the amount of the note, which was entered up on the

next day. The note was renewed every three months until some time in February, 1875, when Lilly sold the store and lot of ground upon which the judgment was a lien to William H. Buss, who, assuming Lilly's indebtedness, took up the old note and gave the bank, in its place, his own note for fifteen hundred dollars to Yost's order, and with Yost's indorsement, the latter consenting to indorse for him. At the same time, there was a written agreement between Lilly and Buss that the judgment given to secure the old note should remain a lien on the above real estate as collateral security for the future indorsement of the note, it being the same debt. Lilly, on his part, agreed to indemnify Yost against his indorsements for the note. Yost continued to indorse for Buss up to February 16, 1876, the date of the last renewal. Upon that day, when Buss took the note to Yost for his indorsement, although he noticed that there was something wrong with Yost, he did not, from his conversation, think him crazy. Buss took the note to the bank, which accepted it and returned the old note canceled."

The note was protested by the bank for nonpayment and suit afterward brought thereon against ¹⁸⁰ the administrator of Yost. The administrator refused payment on the ground that his testator was insane at the time of the indorsement. The court found as a fact that "there was no evidence to charge the bank with notice of his lunacy." The opinion of the court is very brief, and is as follows: "However it might have been had the note in suit been an original note, indorsed by the alleged lunatic for the accommodation of Buss, yet the case was different when it appeared that it was a renewal of a note for a similar amount, upon which he was also an accommodation indorser. There had been several renewals, at each of which, as well as the execution of the first note, Yost was unquestionably of sound mind. He had taken and held a judgment against the original maker as collateral security for the note. Yost was clearly liable on the note of which the note in suit was a renewal. There was full consideration therefor, and the case is directly within the decision of this court in Lancaster County Bank v. Moore, 78 Pa. St. 407; 21 Am. Rep. 24," referred to supra.

But it is insisted that that case is not an authority in the one at bar, because the court there rested its conclusion on the fact that the indorser, Yost, had received in the judgment lien collateral security for his indorsement. It is true the common pleas court, in its opinion, did emphasize this, and did speak of it as a consideration passing to the indorser. Subsequently, however,

that case was referred to, and, by clear implication, approved by ¹⁸¹ the supreme court in *Wireback v. First Nat. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821, and that court ignored, as a controlling element in the case, the fact that Yost had received collateral security. It said: "*Snyder v. Lanbach*, 7 Week. Not. Cas. 464, is where Yost's indorsement of the note was merely a renewal of an indorsement made when he was unquestionably of sound mind, and it was held that he was clearly liable on the note of which the note in suit was a renewal. There was full consideration, and the case was within the decision of *Lancaster County Bank v. Moore*, 78 Pa. St. 407; 21 Am. Rep. 24. The consideration was a debt for the amount of the renewal note.

The case of *Van Patton v. Beals*, 46 Iowa, 62, relied upon by the testatrix, is altogether different from the present case, in that it was held that a lunatic signing a note as surety for an antecedent debt was not bound thereby, although the other contracting party was ignorant of his infirmity. This was evidently a case where a lunatic undertook to bind himself for a debt on which he was not antecedently bound, and the court there properly declined to hold him.

Upon a careful consideration of the case at bar, we are satisfied that it falls under the exception to the general rule which has been heretofore stated, and that the chancellor properly held the estate of the indorser upon the note in question, unless it be true, as urged by the testatrix, that the bank had constructive knowledge of Mr. Sneed's condition when ¹⁸² it accepted this renewal note. This contention rests on the fact that Mr. Neely was president of the bank, and a member of the discount committee which passed on this note, and that, at that time, he was advised of Sneed's insanity. That Mr. Neely did sustain these official relations to the bank, and was informed of the fact in question when this new note was taken, is clear, but it is equally clear that he was not present with the committee when it was received and the old note extinguished, and had no agency whatever in the transaction, and, in fact, only obtained knowledge of it the day after it was consummated. Under such conditions his knowledge could not affect the bank: *Morawetz on Private Corporations*, 540 c; *Union Bank v. Campbell*, 4 Humph. 393.

It follows that the decree of the chancellor is in all things affirmed.

INSANE PERSONS—LIABILITY ON CONTRACTS.—A contract made with a lunatic or person of unsound mind after inquisition and confirmation thereof are absolutely void: *Hughes v. Jones*, 116 N. Y.

67; 15 Am. St. Rep. 386, and note. This subject is fully discussed in the extended notes to *Jackson v. King*, 15 Am. Dec. 361, and *Williams v. Hays*, 42 Am. St. Rep. 753.

CORPORATIONS—KNOWLEDGE OF AGENT AS KNOWLEDGE OF CORPORATION.—Knowledge obtained by a corporate agent is not imputed to the corporation, unless it acts through such agent in a matter in which the information possessed by him is pertinent: *Willard v. Denise*, 50 N. J. Eq. 482; 35 Am. St. Rep. 788, and note; *Casco Nat. Bank v. Clark*, 139 N. Y. 307; Am. St. Rep. 705, and note; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314; 36 Am. St. Rep. 710.

COOPER v. HAMILTON.

[97 TENNESSEE, 285.]

ACKNOWLEDGMENT OF DEED, INTERESTED OFFICER, WHETHER MAY TAKE.—A notary public who is a stockholder and director in a corporation and also its attorney ought not to take and certify the acknowledgment to a trust deed in his favor, but his certificate of such acknowledgment is not void where there is no imputation of improper conduct or bad faith or undue advantage arising out of his relation to the corporation.

Shepherd & Frierson, for Cooper.

E. Y. Chapin and E. M. Dodson, for Association.

286 WILKES, J. The defendant building and loan association in this case claims title to certain premises under the foreclosure of a deed of trust, executed by Cooper and wife, to secure a debt due the association. The complainants claim homestead in the premises, and the bill is filed to secure the same and enjoin the association from taking possession under their foreclosure proceeding.

The theory of the bill is, that the deed of trust which has been foreclosed was acknowledged before one E. Y. Chapin, a notary public, and that the acknowledgment is illegal and void, because the notary, when he took the acknowledgment of the husband and wife, was a stockholder and director in the association and its attorney, and, being thus interested, he was incompetent to take the acknowledgment of any instrument made to or for the benefit of the association. The only question involved is whether an officer so interested is competent to take an acknowledgement, and whether this conveyance, so acknowledged, is valid, and passes the homestead of complainant.

The chancellor was of opinion the acknowledgment was invalid and the conveyance void as to the homestead, and so decreed, and defendant appealed and assigned error.

The cause was heard by the court of chancery appeals, and the

decree of the chancellor was reversed, and complainants have appealed to this court and assigned error, raising the question before stated. ²⁸⁷ There is quite a conflict of authority and diversity of holding in the different states upon the question of whether the act of taking an acknowledgment to a deed or other instrument is a ministerial or judicial act. It has been held to be a ministerial act in the United States courts, and in the courts of Arkansas, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, Maryland, and Ohio. In these states it is held that an officer may take acknowledgment though related, or interested, or a party. But it is held to be a judicial act in other states, to wit: Alabama, California, Iowa, Missouri, North Carolina, Pennsylvania, Virginia, West Virginia, Mississippi. The authorities are collated in 1 Am. & Eng. Ency. of Law, 2d ed., 489. In Tennessee the courts have held that the act is judicial, or quasi judicial, and especially is this so as to the act when it involves the privy examination of a married woman: *Rhea v. Isely*, 1 Leg. Rep. 292; *Shields v. Netherland*, 5 Lea, 197. This holding is doubtless largely due to the fact that, under our statutes originally, acknowledgments were taken in open court, and with the formalities attending other judicial proceedings. This rule has, however, been relaxed until clerks and deputies and notaries may take acknowledgments out of open court, and even in foreign states where this state has no judicial jurisdiction.

Aside from the question whether the act is ministerial or judicial, or both, in its character, it is ²⁸⁸ held, and properly so, that it is unwise and contrary to public policy for an officer to take an acknowledgment to any instrument to which he is a party, or in which he is interested directly or indirectly. In either event, the officer should be disinterested and entirely impartial, as between the parties: *Devlin on Deeds*, sec. 426; *Tiedeman on Real Property*, sec. 810; *Hammers v. Dole*, 61 Ill. 310; *Groesbeck v. Seeley*, 13 Mich. 344. And it is held in a large number of cases that such acknowledgments, affected by interest or relationship, are invalid and void, at least so far as third persons are concerned: 1 Am. & Eng. Ency. of Law, 2d ed., 493, 494.

We have been cited to quite a number of cases in our own state which appear to sanction the holding that such an acknowledgment is not invalid, and among them the cases of *Beaumont v. Yeatman*, 8 Humph. 542, and *Tipton v. Jones*, 10 Heisk. 564. These cases simply involve the question whether a deputy clerk could take an acknowledgment to an instrument to which his

principal was a party, or in which he was beneficially interested, and it was held proper for him to do so, because the deputy is a sworn officer and disinterested. Several unreported cases are also relied on, in which it is claimed this court upheld such acknowledgments when the officers taking them were interested in or parties to the instrument, and such has been the holding of this court. We think the true rule ²⁸⁹ is, that while acknowledgments taken before officers who are related to either party or interested in the instruments are contrary to public policy and by no means to be encouraged, and while the practice, which has become so prevalent, should be discountenanced and discontinued, still, such acknowledgments are not absolutely invalid and void because of such interest or relationship, without more. Where there is no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, the mere fact that the acknowledgment was taken before such officer would not vitiate the instrument or render it void, when otherwise it was free from objection or criticism.

It is certainly improper and bad policy for a judge to preside or act in any case in which he is a party or interested or in which he is related to the parties who are interested, but the fact that a judicial officer does so act in such case does not render the proceedings or judgments void or make either a nullity.

In *Holmes v. Eason*, 8 Lea, 754, this question was maturely considered, and an elaborate opinion was rendered by the court, speaking through Judge Cooper, holding that a judgment rendered by a justice of the peace related to one of the parties within the prohibited degree is not void, but voidable only, and an execution issued on such judgment should not be quashed for that reason alone. The learned judge reviewed the cases thoroughly, and, overruling those ²⁹⁰ in conflict, announced the opinion of the court, as above indicated, as the best and most approved holding. This ruling has been followed in *Posey v. Eaton*, 9 Lea, 500, and in *Grundy Co. v. Tennessee Coal Co.*, 94 Tenn. 326. These cases go upon the idea that the incompetency of the officer is waived, and that the judgments are voidable and not void. In accord with the principles involved in these cases, we think the better rule is, that acknowledgments before parties related or interested are voidable, but not ipso facto void, and while such acknowledgments will not per se be declared void, still they are open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud, or oppression, arising out of the fact of such relationship or interest in the officer taking the acknowl-

edgment. In the case at bar, it is not shown that the complainants were prejudiced in any way by the facts that the acknowledgment was taken before Chapin, or that he practiced any fraud or deception upon them, or that he obtained any undue advantage by reason of his relation to the defendant company, or that he failed, in taking the acknowledgment, to do any thing the law required him to do, but the case is rested solely and entirely upon the ground that an acknowledgment thus taken is ipso facto a nullity and void.

We can see no error in the conclusion reached by the court of chancery appeals, and the decree of that court is affirmed with costs.

Acknowledgments—Interest of Officer Disqualifying Him from Taking.

Parties to Deed.—Aside from the question as to whether an officer, in taking an acknowledgment to a deed, acts in a judicial or in a ministerial capacity, it is well settled that he cannot take an acknowledgment of a deed to which he is a party or in which he is directly interested. The fact that the acknowledgment is taken by a party to the conveyance does not invalidate the deed. It remains good between the parties and those having actual notice of its existence, but such a deed is not properly acknowledged, and this affects its right to registration. A deed must be properly acknowledged before it is entitled to be recorded, and, if not so acknowledged, the fact that it is spread upon the record is not sufficient to charge subsequent purchasers with constructive notice. This rule is so uniformly held by the authorities that it may be said to be universal, notwithstanding the ruling in the principal case, and in *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478, noted above. The prevailing doctrine is thus excellently stated in *Davis v. Beazley*, 75 Va. 491: "A grantee in a deed or beneficiary under it is not allowed as an officer to take an acknowledgment of the deed by the grantor with a view to its registration. The certificate of such acknowledgment is invalid as authority to admit the deed to record, and hence a recordation based upon it is without effect as notice by construction: *Groesbeck v. Seeley*, 13 Mich. 329; *Beaman v. Whitney*, 20 Me. 413; *Wasson v. Connor*, 54 Miss. 351; *Brown v. Moore*, 38 Tex. 645"; and the reason for this doctrine is thus stated in *Wilson v. Traer*, 20 Iowa, 231-233: "It is always within the power of the parties to secure a disinterested officer to take the acknowledgment, and it is certainly no hardship to require them to do so. There is no reason why the fundamental rule, which prohibits a person from being a judge in his own case or an executive officer in his own behalf, should not apply to this case of executive, semi-judicial duties. To hold that a party beneficially or directly interested or a party to an instrument is incapable of taking or certifying an acknowledgment of it, cannot work any possible injury to anyone, while it will keep closed a door of temptation, at least, to fraud and oppression." This rule applies with equal force to grantees, mortgagees, trustees in deed of trust or otherwise, cestui que trusts, and others who may be parties

to a conveyance. Thus the clerk of a county court cannot take his own acknowledgment of a deed executed by him, so as to render it valid as against a subsequent purchaser for value from him, as a deed admitted to record: *Davis v. Beazley*, 75 Va. 491. Or when the clerk of a superior court, who is the grantor in a deed of trust, acknowledges it before a justice of the peace who also takes the privy examination of the wife, and the clerk then adjudges the certificate made by such justice of such acknowledgment and examination to be in due form, admits the instrument to probate and orders registration, such registration is without legal warrant and invalid as to third persons: *White v. Connelly*, 105 N. C. 65; *Turner v. Connelly*, 105 N. C. 72. It has, however, been held that the fact that a county clerk or his deputy is a grantee in a deed does not disqualify him to take the grantor's acknowledgment, but where the officer taking the acknowledgment has such an interest, it is competent for him to impeach his certificate by testimony that the acknowledgment was not taken as the law directs, and, in case of a married woman's acknowledgment, he may testify that she was not examined separately and apart from her husband: *Stevenson v. Brasher*, 90 Ky. 23. If the acknowledgment of a deed is taken by a grantee named therein, such acknowledgment is void, leaving the deed operative between the parties: *Beaman v. Whitney*, 20 Me. 413; *Goodhue v. Berrien*, 2 Sand. Ch. 702; *Hogans v. Carruth*, 18 Fla. 587; *Groesbeck v. Seeley*, 13 Mich. 329; *Lapard v. Sherwood*, 79 Mich. 520. An acknowledgment of an instrument taken and certified by a person interested in it as a grantee should not be admitted to record, and a record thereof does not operate as constructive notice to a subsequent purchaser: *Wilson v. Traer*, 20 Iowa, 231. An acknowledgment of a mortgage taken by one of the parties thereto is void, except as to the parties to the instrument: *Hubble v. Wright*, 23 Ind. 322. An acknowledgment of a chattel mortgage before one of the mortgagees and taken by him is insufficient to entitle the mortgage to record, and its actual record is not constructive notice, though the acknowledging officer is the only justice of the peace in the township: *Hammers v. Dole*, 61 Ill. 307; *Wilson v. Traer*, 20 Iowa, 231. An acknowledgment of a chattel mortgage, made to a partnership before a notary who is one of the partners is void, and the record thereof does not impart constructive notice to third parties: *City Bank v. Raütke*, 87 Iowa, 366. No beneficiary in a chattel mortgage is competent to take the acknowledgment thereto: *Baxter v. Howell*, 7 Tex. Civ. App. 198. It is everywhere conceded that the acknowledgment of a deed of trust, taken by a trustee named therein, is void as authority to admit the deed to record, and, if recorded, it does not impart constructive notice to third parties. A deed of trust so acknowledged remains valid as between the parties to it or third parties having actual notice: *Davis v. Beazley*, 75 Va. 491; *Dall v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Stevens v. Hampton*, 46 Mo. 404; *West v. Krebaum*, 88 Ill. 263; *Holden v. Brimage*, 72 Miss. 228; *Clinch River Veneer Co. v. Kurth*, 90 Va. 737; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Corey v. Moore*, 86 Va. 721; *Brown v. Moore*, 38 Tex. 646. It has been held that the acknowledgment of a deed of trust taken by one of the trustees is void as to such trustee, but, if the execution of the deed

is proved, the defect is cured, at least as to the other trustees: *Darst v. Gale*, 83 Ill. 136. If a deed of trust by a husband and wife is made to a trustee, who, as a notary, takes their acknowledgment, and the deed is then recorded, the recordation is invalid as to both, and the deed wholly void as to the wife, and as to the husband it is valid only between the parties thereto, and as to third parties having actual notice thereof: *Barton v. Brent*, 87 Va. 385; *Tavener v. Barrett*, 21 W. Va. 656. A clerk of a county court in which a deed is to be recorded cannot take and certify the acknowledgment of the grantor in a deed of trust to secure debts in which such clerk is trustee, and a recordation on such an acknowledgment is void: *Nicholson v. Gloucester Charity School*, 93 Va. 101. An acknowledgment of a deed to a trustee taken before him as a notary public is void, although he has no pecuniary interest in the deed, and after it is executed declines to act under it, and another trustee is substituted for him, who makes the sale upon the contingency authorized in the deed: *Rothschild v. Daugher*, 85 Tex. 332; 34 Am. St. Rep. 811. An officer who is interested in a deed of trust as a cestui que trust is disqualified to take an acknowledgment of its execution, and such acknowledgment is void: *Wasson v. Connor*, 54 Miss. 351; *Long v. Crews*, 113 N. C. 256. Such acknowledgment cannot be recorded so as to constitute the deed constructive notice: *Wasson v. Connor*, 54 Miss. 351. A notary public interested in a deed of trust as a preferred creditor named therein is disqualified to take and certify the acknowledgment thereto, and such action, if attempted, is a nullity: *Long v. Crews*, 113 N. C. 256. Thus it has been shown that it is safe to state the general rule to be that the acknowledgment of the execution of a deed taken by a party to it, no matter in what capacity, does not authorize it to be recorded, and the record of it imparts no notice to subsequent purchasers or encumbrancers: *Green v. Abraham*, 43 Ark. 420; *Long v. Crews*, 113 N. C. 256; *Hainey v. Alberry*, 73 Mo. 427. In other words, the record of a deed acknowledged before a person named therein as a party thereto is not evidence against one who has no actual notice of the existence of the deed: *Hainey v. Alberry*, 73 Mo. 427. But it has been held that a trust deed acknowledged before the trustee therein is good between the parties thereto and those claiming under them by descent when the execution of the deed is duly proved: *Bennett v. Shipley*, 82 Mo. 449. And again it was held in *Fredericksburg Nat. Bank v. Conway*, 1 Hughes, 37, that a notary who was one of the beneficiaries in a deed of trust might take a valid acknowledgment of the grantor therein. It is no objection to a sheriff's deed that the judge of the court before which it was acknowledged is the grantee therein: *Lewis v. Curry*, 74 Mo. 49.

Officer's Interest not Appearing by the Deed.—A magistrate bound by contract to procure a wife to join with her husband in a deed to a third person is disqualified to take her privy acknowledgment on the ground of interest: *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 74, and extended note 757. An acknowledgment of a deed must be made before some officer not interested in the land. Hence, an acknowledgment taken before an officer so interested is insufficient for the purpose of admitting the deed in evidence as notice:

Wills v. Wood, 28 Kan. 400. A deed of a married woman acknowledged before the husband of the grantee, who is the procuring cause of its being made, is void: **Jones v. Porter**, 59 Miss. 628. It has been decided that a party owning an interest or share in a tract of land is not so far interested in the entire land as to prevent him, in his official capacity, from taking an acknowledgment of a deed, conveying to third party another and distinct share in such land: **Dussaume v. Burnett**, 5 Iowa, 95. A deed of trust to secure a debt due to a county clerk may be acknowledged before his deputy: **Tipton v. Jones**, 10 Heisk. 564. A number of cases maintain that where it does not appear from the face of the instrument or otherwise that the officer taking the acknowledgment is disqualified to act by reason of interest, the instrument is entitled to record, and such record becomes notice to subsequent purchasers, creditors, or encumbrancers: **Benson v. Hove**, 45 Minn. 40; **Baucks v. Ollerton**, 26 Eng. L. & Eq. 508. In **Stevens v. Hampton**, 46 Mo. 404-408, it is said, "that when the recorded instrument shows upon its face that the acknowledgment was taken by a party to it, or by a party in interest, it is improperly recorded, and is no constructive notice, but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect." Thus the fact that the officer taking an acknowledgment of a chattel mortgage is a partner of the mortgagee, and negotiates the loan secured, does not render the mortgage fraudulent as to other mortgage creditors, unless it is shown that such officer has an interest in either the lien or the note secured: **Brereton v. Bennett**, 15 Colo. 254. In **National Bank v. Conway**, 1 Hughes, 87, it was held that a notary public, not named in the instrument, was competent to acknowledge and certify a deed of trust, although he was interested as one of the beneficiaries in the trust. And in **Titus v. Johnson**, 50 Tex. 224, it was decided that the effect of the record of a deed cannot be destroyed by parol evidence that the officer before whom it was acknowledged had an interest in the land not disclosed by the deed and acknowledgment.

Relationship.—It is a general rule that the acknowledgment of a deed is not invalidated by the fact that the officer before whom it is taken is in some way related by blood or marriage to the parties to the instrument: **Penn v. Garvin**, 56 Ark. 511; **Gibson v. Norway Sav. Bank**, 69 Me. 579. This rule is based on the fact that the taking of an acknowledgment is a ministerial and not a judicial act. Consequently, a commissioner of deeds may take the acknowledgment of a deed though so related to the parties to it as to be disqualified to act as judge or juror in a trial where they are parties: **Lynch v. Livingston**, 6 N. Y. 422. A justice of the peace is not disqualified by his relationship to the parties from taking the acknowledgment of a deed in which his father is the grantor and his wife is the grantee: **Remington Paper Co. v. O'Dougherty**, 81 N. Y. 474. The acknowledgment of a deed taken by a notary who is the nephew of a party thereto is valid, though such officer is active in procuring its execution, but is neither a party to the deed nor beneficially interested in its execution or delivery: **First Nat. Bank v. Roberts**, 9 Mont. 323. An acknowledgment of a mortgage taken by the brother in law of the mort-

gagee is neither illegal nor its record bad: *Welsh v. Lewis*, 71 Ga. 887. And an acknowledgment of a mortgage made to a married woman is not invalid though taken before the husband of the mortgagee: *Kimball v. Johnson*, 14 Wis. 674. But such an acknowledgment has been held to be void when the husband is the procuring cause of the mortgage having been made: *Jones v. Porter*, 59 Miss. 628-631.

Attesting Witness.—An officer who is an attesting witness to a deed is not thereby rendered incompetent to take the acknowledgment of its execution: *Trenwith v. Smallwood*, 111 N. C. 182. If the certificate of the acknowledgment of a deed given by a commissioner of deeds who is also one of the attesting witnesses, and the facts do not appear from the deed itself, it is admissible in evidence if regularly recorded: *Baird v. Evans*, 58 Ga. 350.

Agent or Attorney.—An officer who identifies himself with a transaction evidenced by a written instrument by placing his name on the face thereof as the avowed agent of one of the parties is incompetent to take the acknowledgment of such instrument: *Sample v. Irwin*, 45 Tex. 567. Otherwise, the mere agency of the officer does not disqualify him. Thus, a notary who acts as agent for the mortgagor in obtaining a loan secured by mortgage is not so interested as to be disqualified to take the acknowledgment of the mortgage: *Penn v. Garvin*, 56 Ark. 511. An acknowledgment of a mortgage is not rendered invalid by the fact that the officer before whom it is made negotiated the loan secured thereby, and was a partner of the mortgagor, there being no evidence to show that he was a party in interest: *Brereton v. Burnett*, 15 Colo. 254. A notary who is also deputy sheriff may take the sheriff's acknowledgment of a deed of foreclosure made by the sheriff as trustee under a deed of trust: *Ewing v. Vannewitz*, 8 Mo. App. 602. A deputy county clerk may take the acknowledgment of a deed to the county clerk: *Pilaud v. Taylor*, 113 N. C. 1. But a deed of a married woman acknowledged before the husband of the grantee, who is the procuring cause of its being made, is void: *Jones v. Porter*, 59 Miss. 628.

A representative of a corporation aggregate having authority to execute deeds in its behalf may lawfully take the acknowledgment of such deeds: *Hopper v. Lovejoy*, 47 N. J. Eq. 573. An officer of a corporation whose duty it is to countersign and register its deeds is not disqualified from taking the acknowledgment thereof as a notary public when his signature is not necessary to the validity of the instrument: *Sawyer v. Cox*, 68 Ill. 180. A member of a corporation in a purely eleemosynary institution, although he receives a small amount of money for attending its meeting and acting as secretary, is not disqualified from taking the acknowledgment of a grantor in a deed of trust to secure a debt due to such corporation: *Nicholson v. Gloucester Charity School*, 93 Va. 101. A notary is not qualified from taking the acknowledgment of a mortgage made to a corporation from the fact that it is shown that at the time of taking such acknowledgment he was the secretary and treasurer of the corporation, it not being shown that he was a stockholder in the corporation or beneficially interested in the mortgage: *Horbach v. Tyrrell*, 48 Neb. 514, where the cases involved in the topic of this note are examined at length.

An attorney for either husband or wife may, as a notary, take the acknowledgment of either to a deed, and the fact that he is such attorney does not invalidate the acknowledgment: *Bierer v. Fretz*, 32 Kan. 329; *Romanes v. Frazer*, 16 Grant U. C. 97. The fact that the notary taking the wife's privy acknowledgment of a mortgage upon her separate property to secure her husband's debts is the general attorney for the husband, but has no interest in the transaction, does not disqualify him from taking such acknowledgment: *Kutch v. Holley*, 77 Tex. 220. The acknowledgment of a deed is valid when taken by a notary who is the attorney of one of the parties to the instrument, but who is not a party thereto nor in any way interested therein: *First Nat. Bank v. Roberts*, 9 Mont. 323. It has been held that a notary public who is attorney for a mortgagor is disqualified to take the mortgagee's acknowledgment to the mortgage, and that a mortgage recorded on such an acknowledgment is not legally recorded and does not constitute constructive notice: *Nichols v. Hampton*, 46 Ga. 353. It has, however, lately been held in *Wardlaw v. Mayer*, 77 Ga. 620, that although an attorney acts for both parties in the preparation of a mortgage, he is not thereby disqualified from attesting it, and that his attestation as a notary is valid and entitles the instrument to be recorded. And the fact that he is subsequently employed by the mortgagees to foreclose the mortgage and collect the debt does not relate back and affect the validity of his attestation.

IN THE SUBSEQUENT CASE of *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478, it was decided that an acknowledgment of a deed of trust taken by a deputy clerk who is beneficiary therein, though irregular, is not void. And the court said: "The question presented by the assignments is that the instrument was acknowledged before a deputy clerk who is a beneficiary under the assignment, and was therefore illegal and void, and did not authorize the registration of the instrument, and such registration would not, under these circumstances, be notice to the world. We have held, at the present term of the court, that an acknowledgment taken before an officer related to the party, or interested as a beneficiary under the instrument, is not void, but irregular. We consider this question as settled, although, as heretofore stated, such practice should be abandoned and not persisted in": See *Cooper v. Hamilton etc. Assn.*, 97 Tenn. 285; ante, p. 795."

SOUTHERN BUILDING & LOAN ASSOCIATION v. DAWSON.

[97 TENNESSEE, 337.]

ELEVATORS.—THE OBLIGATION TO PASSENGERS IN ELEVATORS or to persons who are about to become passengers, thereon, is the same as that of a common carrier of passengers, which is that the highest degree of care and caution must be exercised for their safety.

ELEVATORS, LEAVING OPEN AND UNATTENDED.—The owner of a building who leaves a passenger elevator therein open and unattended is guilty of negligence, and if a person enters it and is injured, the owner is answerable, if, under the circumstances, such person was not guilty of contributory negligence; and whether he was so guilty is a question of fact for the jury to determine under proper instructions from the court.

S. G. Heiskell and G. W. Winstead, for Southern Building & Loan Association.

Williams, Henderson & Davis, for Lawson.

³³⁸ **WILKES, J.** This is an action for damages for personal injuries. There was a trial before the judge and a jury in the court below, and a verdict and judgment for six hundred dollars, and defendant building association has appealed and assigned errors.

These assignments, eight in number, may be considered under two heads, to wit: That plaintiff is not entitled to recover: 1. Because she was guilty of contributory negligence; and 2. There is no evidence to support the verdict.

The facts, so far as necessary to be stated, are that the defendant company owns a five-story building on Wall street in the city of Knoxville, and, for the convenience and use of its tenants, who occupy offices therein, and for those who have occasion to enter the building on business or otherwise, it operates a passenger elevator, running from the ground to the top floor. The plaintiff is a lady about forty-six years of age, and had occasion to enter the building on business with a tenant occupying the fifth floor. She entered the main hallway of the building on the first floor about 1 o'clock in the day, and, seeing a door open on the side of the hall and some person therein, partially entered the room and inquired where she could find Mr. Cagle, the gentleman whom she desired to see. She states that ³³⁹ the person addressed replied to her to "walk out into the hall and take the elevator and go down on the fifth floor." His testimony is, that he said to her to "go out into the hall and take the elevator and go to the fifth floor."

The gentleman thus addressed was, it appears, the cashier of the defendant company, but had no control over or anything to

do with the elevator, and we think this inquiry and answer bear very slightly, if at all, upon the merits of the controversy.

It appears that the lady approached the elevator shaft and the door was standing open. She entered the shaft and caught hold of one of the ropes by which the carriage was operated, and attempted to set the carriage in motion. About this time she became suspicious that she had made some mistake, and attempted to step out of the shaft, and had perhaps put one foot out on the floor of the hall, when the carriage descended from above and caught her, striking her on the head and bending her down, and injured her about the chest, shoulders, and back. From the injury she was confined to her bed and room for some time, had medical attendance for a month or more, and was quite seriously injured. A physician, Dr. Nash, was called to see her as soon as she was injured, and attended her afterward, and testifies that the injury and shock were quite serious. No question is made about the extent of the injury or amount of damages, except so far as the contention is made that her damages should ³⁷⁰ be nominal, if anything, on account of her contributory negligence.

Plaintiff explains that she had been familiar with the elevator at the cotton mills, and, it appears, knew how to operate that by hand, and she had seen other elevators. The elevator at this building was started by pulling on a rope, but the motor power was water. She states that she saw the door open and stepped into the shaft, and thought it looked similar to the one she had been accustomed to at the mills. It appears from other evidence in the cause that to go into the shaft as she did would require a step down of about twelve inches, that the hall was well lighted, and the elevator shaft was not dark, and that scattered on the floor was old paper, grease, and other dirty accumulations, that must, it is insisted, have attracted the attention of a prudent person and served to deter them from entering it.

There is no objection to the charge of the court. It states the duty of the defendant to keep its building and elevator in reasonably safe condition, and the plaintiff's duty to exercise ordinary care for her own safety. The jury were told that if they believed that she did not exercise ordinary care, and if they believed that a person of ordinary care and prudence, situated as she was and under the surroundings, and circumstances that surrounded her on that occasion, would not have gone into the elevator, although the door was open, and that her negligence was the direct and proximate cause of the ³⁷¹ injury, then she could not recover. The matter was thus left to the jury upon a charge which is not excepted to, and they

have returned a verdict as before stated. In the charge of the court as to the degree of care required of the owner and operator of the elevator there is certainly nothing of which the defendant can complain. It has been held in a number of cases that the obligation to passengers on elevators (and the same rule would apply to those attempting to become passengers) is the same as that of common carriers to passengers, and that they must use and exercise the highest degree of care and precaution: See *Mitchell v. Marker*, 62 Fed. Rep. 139, reported also in 25 L. R. Ann. 33, opinion by Lurton, circuit judge; *Goodsell v. Taylor*, 41 Minn. 207; 16 Am. St. Rep. 700; *Treadwell v. Whelton*, 80 Cal. 574; 13 Am. St. Rep. 175; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424; *Hayward v. Miller*, 94 Ill. 349; 34 Am. Rep. 229.

In this case, the association was unquestionably guilty of negligence in allowing the door of the elevator shaft to be open, into which persons might incautiously enter, and the question of whether the defendant exercised proper care in entering it, or was guilty of such contributory negligence as would bar her recovery, was properly left to the jury under a charge which was not excepted to, and the plaintiff, having given her explanation of the whole matter, we can see there was evidence to support the verdict.

372 The charge as to the effect of plaintiff's contributory negligence, if they should believe it remotely contributed to the injury, but was not its proximate, direct, and efficient cause, is correctly given, and the jury were properly instructed in such case to abate the damages.

We can see no error of law, and, the jury having passed upon the facts, we are constrained to affirm the judgment with costs.

Liabilities of Owners of Elevators Used for Passengers or Employees

One who owns and operates a passenger elevator, either by himself or his agent, is bound at all times to exercise the highest degree of reasonable care and caution to make it safe for all persons, whether passengers or employees, who have a right to use it, or who use it with the owner's knowledge or consent. The owner of such an elevator, controlling its operation, is required to exercise great care and caution, both in its construction and operation, so as to render it as free from danger to those having a right to use it as careful foresight and precaution can reasonably dictate. Nothing short of this will excuse the owner, unless it appears that the party injured was guilty of contributory negligence producing the accident: *Wise v. Ackerman*, 76 Md. 375; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424; *Mitchell v. Marker*, 62 Fed. Rep. 139; *Lee v. Knapp*, 55 Mo. App. 391; *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. Rep. 403; *Treadwell v. Whittier*, 80 Cal. 515; 13 Am. St. Rep. 175. As the

owner of an elevator must operate it with reasonable care and diligence, one having the right to use it may assume that this duty is faithfully performed, and he is not required to exercise that degree of care and caution which could properly be demanded of him under other circumstances: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403. In determining whether the owner of an elevator has exercised due diligence in making it reasonably safe, the usage of others is not the sole criterion, because such diligence does not, as matter of law, follow from the fact that the elevator is such as is ordinarily used for like purposes by reasonably prudent men: *Lee v. Knapp*, 55 Mo. App. 390. The relations between the owner and manager of a passenger elevator and those entitled to be carried in it are in all respects similar to those between a carrier of passengers and those carried by him. Such owner, although not an absolute insurer of safety, is required to exert the utmost care and foresight for the safety of his passengers, and is responsible for the slightest degree of negligence: *Goodsell v. Taylor*, 41 Minn. 207; 16 Am. St. Rep. 700; *Marker v. Mitchell*, 54 Fed. Rep. 637; *Mitchell v. Marker*, 62 Fed. Rep. 139; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175. Hence, in case of the giving way of an elevator, causing injury to a passenger therein, the burden of proof is on the owner to show that it occurred through no fault or neglect of his: *Goodsell v. Taylor*, 41 Minn. 207; 16 Am. St. Rep. 700; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175. A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier, and liable as such, both as to the machinery and the conduct of his servants: *Marker v. Mitchell*, 54 Fed. Rep. 637; *Tousey v. Roberts*, 114 N. Y. 812; 11 Am. St. Rep. 655; *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403. A person who undertakes to run an elevator to carry passengers, who intrust themselves entirely to his care and control, must provide experienced and skilled operators, and the standard required for an elevator man is the exercise of that care which may reasonably be expected of an elevator man of skill and experience: *Marker v. Mitchell*, 54 Fed. Rep. 637; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424. An owner of a passenger elevator must also keep pace with science, art, and modern improvements, in supplying safe machinery and appliances for its use: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175.

An elevator for the carriage of persons is not supposed to be a place of danger, to be approached with great caution, but may be assumed to be, when the door is thrown open by an attendant, a place that may be safely entered, without stopping to look, listen, or make a special examination: *Tousey v. Roberts*, 114 N. Y. 812; 11 Am. St. Rep. 655.

The rule that a carrier of passengers by elevator must exercise the highest degree of care, includes the management and control of the machine, and it is the duty of an elevator operator to give passengers therein a reasonable opportunity to obtain their balance upon entering before a rapid and sudden upward movement is commenced, having a tendency to disturb the equilibrium of one yet in motion: *Mitchell v. Marker*, 62 Fed. Rep. 140.

A presumption of the safety of the cable of a passenger elevator does not arise from the fact that it is not obviously dangerous, and has been used with safety for years; nor is it presumed that it will continue safe for use without examination to ascertain its condition, if its safety may not have become impaired by wear: *Goodsell v. Taylor*, 41 Minn. 207; 16 Am. St. Rep. 700. If an accident is caused by a defect or fault in an elevator the owner thereof is answerable to the person, whether employé or passenger, injured thereby, unless such defect or fault could not have been discovered on a reasonable and careful examination according to the best known tests reasonably practicable: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175; *Bartley v. Trorlicht*, 49 Mo. App. 214.

The owner of the elevator is not excused from that degree of care and diligence otherwise exacted of him by the fact that the elevator in use was constructed by a competent and skillful manufacturer, from whom it was purchased. Such manufacturer is a mere agent and servant in the construction of the elevator, for whose want of care its owner is responsible: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175. An owner of an elevator is not liable for personal injury occasioned by its fall caused by shutting off the water in the street main which furnished the power for running the elevator, provided it had all safety appliances, and its owner did not know the effect or danger arising from shutting off such water, although he did know that it had been shut off: *Shattuck v. Rand*, 142 Mass. 83. If, in an action to recover for injury received in falling down the shaft of a freight and passenger elevator owned and controlled by the owner of a building or his agent, it is shown that the plaintiff, who was employed by a tenant of the landlord owning the elevator, was injured by walking into the elevator shaft under the supposition that the elevator was there, because the door of the shaft was open and the bar pulled back, and it was too dark for him to see whether the elevator was there or not, the evidence is sufficient to establish the negligence of the owner in failing to exercise that ordinary and reasonable care, caution, and vigilance in keeping the elevator door closed to prevent injury to those entitled to ride in the elevator: *People's Bank v. Morgolofski*, 75 Md. 432; 82 Am. St. Rep. 403. But an employé injured in attempting to get upon an elevator while it is ascending, when it is not his duty to do so, cannot recover, in the absence of negligence by the person running the elevator: *Block v. Swift*, 161 Ill. 107. And the same rule applies to a passenger who attempts himself to open the elevator door and step aboard while the elevator is descending: *Green v. Young Men's Christian Assn.*, 65 Ill. App. 459. A person who has been notified not to ride on an elevator, and that it is against the rules for him to do so, cannot recover for an injury received while riding thereon after such notice: *Springer v. Byram*, 137 Ind. 15; 45 Am. St. Rep. 159.

It has been held that it is not of itself negligence on the part of the owner of a passenger elevator to employ a boy twelve years of age to operate it, so as to render such owner liable for an injury to another boy of about the same age while riding in the elevator, and who is a fellow-servant or passenger, with a right to ride therein: *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402. On the other

hand, the exact reverse of this doctrine was maintained in Kentucky Hotel Co. v. Camp, 97 Ky. 424. A delivery boy about thirteen years of age employed in a mercantile establishment who is required to ascend and descend from one floor to another on an unguarded freight lift, and is injured while in the performance of his duties, can recover therefor, in the absence of contributory negligence on his part, of which the jury is to judge: Strawbridge v. Bradford, 128 Pa. St. 200. A delivery boy fifteen years of age who, when riding in the freight department of a combined freight and passenger elevator, is let off at the floor he wants, and leaving the elevator door open delivers a package on that floor, and going back assumes that the elevator is still there, and, without looking to see, steps through the open door and falls to the bottom of the well and is injured, is guilty of contributory negligence which bars a recovery, especially when he knows that the boy in charge of the elevator cannot shut such open door without raising the elevator and getting from the passenger department into the freight box: Ballou v. Collamore, 160 Mass. 246. A messenger boy with telegrams to be delivered in a hotel, who, after getting into the elevator shows his telegrams to the elevator operator, who hands them back, and, starting the elevator, stops at the third floor, when there are no other passengers in the car, has a right to assume that the elevator has stopped at the floor where he is required to alight and to attempt to do so; and it is the duty of the operator, before starting the elevator again to see that there is no danger to the boy, or to notify him that he has not arrived at the floor on which he is required to alight; and the failure to do so and starting the car, resulting in injury to the boy, is such negligence as to make the owner of the elevator liable: Mitchell v. Keene, 87 Hun, 266. In an action to recover for injury received in falling down an elevator shaft, when the accident is caused solely by the negligence of the owner and operator of the elevator, the jury, in estimating the damages, is at liberty to consider the health and condition of the plaintiff before the accident, as compared with his present condition in consequence thereof, and whether or not the injury received is, in its nature, permanent, and, how far it is calculated to disable him from engaging in those pursuits and employments for which, in the absence of such injury, he would have been qualified, and also to consider the physical and mental suffering to which he was subjected by reason of such injury, and to allow such damages as will be a fair and just compensation for the injury sustained: People's Bank v. Morgolofski, 75 Md. 432; 32 Am. St. Rep. 403. A tenant of a building, in which a passenger elevator is used by him in his business is bound to keep such elevator in a reasonably safe condition and in proper repair for the purposes for which it is used by his authority or direction, or by those entitled to use it, and he is liable for personal injuries received by his servant, who, while properly using it, is injured by reason of its unsafe condition and want of proper repair: Oberfelder v. Doran, 26 Neb. 118; 18 Am. St. Rep. 771.

Passengers on Freight Elevators.—An employé of the owner of an elevator, familiar with its construction, and with knowledge that it is used in the business only for transporting material, and who rides thereon under an implied license, for his own pleasure or conven-

lence, accepts whatever risk is incident to such construction and operation, and can require of the owner only ordinary care in the operation of such elevator: *O'Brien v. Western Steel Co.*, 100 Mo. 182; 18 Am. St. Rep. 36; *Wise v. Ackerman*, 76 Md. 375; *McCarthy v. Foster*, 156 Mass. 511. An employé is not entitled to recover for injuries received by falling down an unguarded elevator well, when, in going to the upper rooms of a building, he made use of a freight elevator not designed for passengers, and used by him before without invitation and contrary to orders, and, on reaching such rooms, he stepped off the elevator, closing the door, and upon going back in a great hurry, opened such door, and, without looking, stepped into the elevator well, and fell, the elevator having, in the meantime, been lowered by pulling a rope: *Patterson v. Hemenway*, 148 Mass. 94; 12 Am. St. Rep. 523. One who enters on premises by permission only and uses a freight elevator thereon without inducement or invitation for the purpose of hoisting or lowering himself or others, is a mere licensee, and cannot recover for injury received from defects in the elevator, or from obstructions, or from falling into the elevator well. This rule applies to a fireman who goes upon premises for the purpose of extinguishing fire: *Gibson v. Leonard*, 143 Ill. 182. And to one who, together with his goods, uses a freight elevator of a railroad company for the purpose of putting himself and his goods on board the cars without invitation from the railroad company: *Snyder v. Naches etc. R. R. Co.*, 42 La. Ann. 302. The same rule has been applied where the owner of premises furnished a passenger elevator starting from the street floor, and a freight elevator starting from the basement, and the party injured, being desirous of seeing the engineer of the building, went into the basement, and, not finding the engineer there, took passage to the fifth floor of the building, and was injured in so doing. In this case, it was held that the owner held out an express invitation to people to use his passenger elevator which negatived any possible inference of an invitation to use the freight elevator for passenger purposes: *Amerine v. Hunter*, 105 Mich. 347.

ADCOCK v. SMITH.

[97 TENNESSEE, 373.]

EXEMPTION OF WAGES.—Under a statute exempting from execution or attachment the wages of any mechanic or laboring man, one employed to puddle iron at a specified rate per ton, and who is required to commence and quit work at specified hours, is entitled to hold as exempt moneys due him for such work.

S. G. Heiskell, for Adcock.

J. F. J. Lewis, for Smith.

373 WILKES, J. This is a garnishment proceeding to reach what is claimed as exempt wages under the provisions of Miliken and Ventrees' Code, section 2931. This section, in effect,

exempts from execution, seizure, or attachment thirty dollars of the wages of every mechanic ³⁷⁴ or laboring man, and the only question is, Does the defendant, William Smith, bring himself within the terms of this exemption? The cause was commenced before a justice of the peace and taken by appeal to the circuit court, and that court held that the amount due defendant was due him as the wages of a laboring man and not the subject of garnishment, and plaintiffs have appealed and assign error.

The Knoxville Iron Company, which was garnished in the case, answered. The testimony of the secretary and treasurer was also taken, and is substantially the same as the answer, and is to the effect that Smith was in the employment of the company, and that the company owed him ten dollars, of which eight dollars and forty cents was due July 20, 1895, and one dollar and fifty-five cents due August 20, 1895; that the indebtedness was for puddling iron at the rate of three dollars per ton; that the contract with Smith was to pay him for the tons or parts of tons he puddled, and that the company does not hire puddlers by the day or month, but by the ton alone. Smith testified that he worked for the iron company boiling iron, and was paid three dollars per ton; that he was required to go to work at a certain hour and quit at a certain hour, and that unless he complied with the hours he would be discharged. He adds, "I am a mechanic and laboring man, and work for wages"; that the company paid him three dollars per ton for the iron he boiled, and that he worked upon no other terms. This is all ³⁷⁵ the evidence in the case, and presents the facts upon which the decision must be based. Briefs have been filed on both sides, but no authority has been cited. It is insisted on the one hand that Smith simply has a contract to puddle iron, and that he stands in the same attitude as would a man who contracts to build a house for \$500 or any other amount. On the other hand, attention is called to the fact that Smith received his pay monthly on the twentieth of each month; that he was compelled to begin and quit work at a certain hour, and these features, it is insisted, make him a laborer for wages.

We have no decision of this court directly adjudicating the question involved. We have made search among the authorities for the holdings in other states. Wages is defined to be the compensation paid by the day, week, month, etc., for the services of laborers or other subordinate or menial employes: 28 Am. & Eng. Ency. of Law, 513; Abbott's Law Dictionary; Anderson's Law Dictionary.

Wages, in the sense of the exempting statutes, are held to be such as are earned by the hands and labor of the individual himself and his family under his direction, and does not extend to what he earns as superintendent or master of other laborers: 2 Shinn on Attachment and Garnishment, 558. This holding will not be questioned, but the point presented is, Does the term "wages" embrace compensation to be paid by the job or by the amount performed, or is it limited to cases where the compensation ³⁷⁶ is fixed by the length of time engaged. In Shinn on Attachment and Garnishment, it is held that the wages of a miner who himself works in a coal mine at so much per ton comes within the exemption, citing *Pennsylvania Coal Co. v. Costello*, 83 Pa. St. 241.

In *Ford v. St. Louis etc. Ry. Co.*, 54 Iowa, 728, the court, among other things, said: "The word 'wages' means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service or a fixed sum for a specified piece of work—that is, payment may be made by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service, but it may also be determined by the work done. Wages means compensation estimated in either way." Our own decisions hold that the statutes creating exemptions are to be liberally construed in favor of the debtor class: *Collier v. Murphy*, 80 Tenn. 800; 25 Am. St. Rep. 698.

We are unable to see why a laborer should be deprived of this exemption because his labor is compensated by the job, or by the amount of work or number of articles finished, instead of by the number of hours he is employed. He is no more an independent contractor when he agrees to puddle iron at so much per ton, than he would be if he were to receive so much per day. In either case, he is laboring with his own hands for an employer, and ³⁷⁷ under his direction and control and superintendence, and he is in no sense an independent contractor, working when and how he may choose. Our farmers employ laborers to pick cotton for them at a certain rate per one hundred pounds, or to cut wood at a certain rate per cord, and the manufacturer employs laborers to weave cloth at so much per yard, and the mine owner employs laborers to mine coal by the ton, and so on through the various industries, and certainly in such cases the persons employed are "laborers" working for "wages," the amount of which is fixed, not by the time engaged, but by the results achieved, and the law applies in the one case as well as in the other.

There is no error in the judgment of the circuit court, and it is affirmed with costs.

EXEMPTION OF WAGES.—Commissions due an employe for personal services are not liable to attachment: *Hamberger v. Marcus*, 157 Pa. St. 133; 37 Am. St. Rep. 719; and note. And so are the personal earnings of an artist: *Millington v. Laurer*, 89 Iowa, 822; 48 Am. St. Rep. 385. But the wages of a "commercial traveler" are subject to garnishment: *Brisco v. Montgomery*, 93 Ga. 602; 44 Am. St. Rep. 192. See, also, the extended note to *Brown v. Hebard*, 91 Am. Dec. 411.

McCAULEY v. BUILDING AND SAVING ASSOCIATION.

[97 TENNESSEE, 421.]

BUILDING AND LOAN ASSOCIATIONS—FIXED PREMIUM, WHAT IS.—A provision in the by-laws of a building and loan association declaring that no money shall be loaned for a greater premium than thirty per cent, nor a less premium than twenty-nine and seven-eighths per cent, provides for a fixed premium.

DEFINITION.—A BUILDING AND LOAN ASSOCIATION is an organization created for the purpose of accumulating a fund by monthly subscriptions and savings of its members to assist them in building and purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society upon good security.

BUILDING AND LOAN ASSOCIATIONS.—A PREMIUM, TO BE LEGAL, must be one that is bid for a right of precedence in taking a loan at a competitive sale, and, when there is no such sale and no bid, there can be no legal premium.

BUILDING AND LOAN ASSOCIATIONS, CONTRACTS OF, WHEN USURIOUS.—If a building and loan association adopts and enforces a by-law which provides that no loan shall be made at a premium of less than twenty-nine and seven-eighths per cent, nor more than thirty per cent, a loan made by it as a result of the by-law, and not of competition between bidders therefor, is usurious, and a contract for its repayment with such premium will not be enforced. The court will merely require the borrower to do equity by repaying the money borrowed with legal interest, after being first credited with such payments as he has made with legal interest.

J. Parker, for McCauley.

H. T. Cooper, for Building and Saving Association.

⁴²² **WILKES, J.** The original bill was filed to enjoin the sale of a house and lot under a trust deed, executed by complainant and her husband, to secure a debt due to the defendant building association. The chancellor refused to grant the injunction. The lot was sold and purchased by the City National Bank, which held a second mortgage on the lot, subordinate to that of the association. Complainant thereupon filed a supplemental bill, bringing that bank before the court, seeking to recover three hundred and forty dollars and seventy-two cents, claimed to be

usury exacted on the loan by the defendant building and saving association, of complainant. On the trial upon the merits, the chancellor refused any relief, and dismissed complainant's bill, and the complainant appealed and assigned errors. The court of chancery appeals reversed the holding of the chancellor, and granted the complainant the relief asked, and defendants have appealed to this court and assigned errors. It appears from the finding of fact by the court of chancery appeals that the complainant was a subscriber to the stock of the defendant company in an aggregate amount of sixteen hundred dollars. She borrowed money from the association, and gave her note therefor for sixteen hundred dollars, bearing interest. She received upon this note eleven hundred and twenty dollars, and the remainder, four hundred and eighty dollars, was claimed by the association as premium or bonus required for the loan. The charter ⁴²³ of the company is not in evidence, but the by-laws are; and the court of chancery appeals find that they contain these provisions:

"The funds of the association, as they accumulate in the treasury, shall be offered and loaned by the board of directors to the best use and application among the stockholders entitled to borrow the same. The number of shares shall be regulated by the board of directors.

"When two or more bids at the same rate of premium are offered, the preference may be given to the borrower whose application has priority of date, or whose property, in the opinion of the committee of examination, appears to be the best security for the loan, other things being equal. Applications for loans may be made to the secretary, at any time before the weekly meeting, accompanied by the necessary papers, who shall note thereon the date of the reception. No money shall be loaned at a greater premium than thirty per cent, nor less than twenty-nine and seven-eighths per cent. The successful applicant at the time of receiving the amount loaned, shall pay a premium of thirty per cent or amount bid for the same, and shall secure the repayment of said loan, with legal interest, by satisfactory bond or mortgage upon real estate, and interest on all loans taken by stockholders shall be paid weekly from the time of bidding for the same.

"In case the funds of the association shall not be called for by any stockholder furnishing satisfactory ⁴²⁴ security, and should remain unproductive for one month, the board of directors may lend to others than members of the association, provided such loans are secured by a lien on real estate, and, provided further,

that such loan shall not be made if as many as two directors object."

There are other provisions regulating the payment of fines, dues, etc., and providing for steps to collect the loans when interest is in arrears for six months. It appears that the purchasing bank had a second mortgage on the property, and that it bought the house and lot under foreclosure of the trust deed, and paid therefor to the association twelve hundred and fifty-eight dollars. The court of chancery appeals find as a fact that the by-laws above copied were in force when the loan was made, and the loan was made to complainant under the operation of the rule and in conformity to it. The contention in this case is narrowed down to the question whether there was usury in this transaction, and whether the premium was a fixed premium, and, if so whether it made the contract unlawful. It is insisted that it is not a case of fixed premium, and not a case of usury, and not contrary to the laws governing building associations.

The court of chancery appeals find that it is a case of fixed premium; that the margin of one-eighth of one per cent between the highest and lowest rate is a mere device to evade any trouble arising out of an absolutely fixed premium, and is too small and inconsiderable to be considered, except ⁴²⁵ as an evidence of an attempt at such evasion. In this we think that court is correct. This by-law unquestionably fixes a minimum premium of twenty-nine and seven-eighths per cent and a maximum premium of thirty per cent, and no loan could be made except between these figures, and, as a fact, none was made at less than thirty per cent. It must be held, therefore, that the by-laws of the association fixed a premium on all loans, and that no loans could be made at a premium below the sum fixed as minimum nor above the sum fixed as maximum. In regard to the illegality and usurious character of such provisions in the by-laws of a building association, there are some adjudications in other states, and our own decisions bear upon the principle involved. We are admonished that the question is an important one, and likely to affect many loans and associations that are now in existence, and we have carefully examined the question. We have not the time to consider the origin and history of building associations, but we deem it proper that we should advert to their original design and purpose. Many of our people have become shareholders in such associations. Through them some have been enabled to secure homes and houses that they could not otherwise have secured, and many others have lost their homes by foreclosure sales and

burdensome requirements. They have increased in number and grown in wealth until a great portion of the real estate of the country is covered by their mortgages ⁴²⁶ and the dockets of our courts are crowded with the settlements of controversies between the companies and their members. In their original conception, their object was to enable the poor and those of small means and incomes to acquire homes and build houses, and thus to become better citizens and more identified with the growth and welfare of the country. The original purpose is well foreshadowed by the name of "building associations," and the loan feature was a mere incident to effect its primary object. The theory was to enable persons whose earnings were small to become, by a system of compulsory saving, the owners of homesteads either at the end of a certain time or in anticipation of it; and the scheme, as originally framed, was not complicated or difficult to understand.

It has been well said: "A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscriptions and savings of its members, to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society, upon good security": 2 Am. & Eng. Ency. of Law, 604.

And again: "To all practical intents, it may be said they enable a number of associates to combine and invest their savings to mutual advantage, so that from time to time any individual among them may receive, out of the accumulation of the pitances which each contributes periodically, a sum by way ⁴²⁷ of loan wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the encumbrance out of his subscription. It is only so far as they serve these purposes, and are confined to the objects necessarily involved therein, that the acts of the building association fall properly within the powers granted to them. As soon as they transgress their limits, they are acting ultra vires": Endlich on Building and Loan Associations, sec. 283.

And again: "If a building association invests its money in the purchase of real estate (and, it may be added, in any other way), looking forward to an increase in its value for the realization of a great gain, to the exclusion of a member who desires the whole or a portion of that money, to enable him to acquire and improve real estate of his own, and who offers acceptable security for the loan, it is doing precisely what it was not created for. It

is tying up money, whilst its business is to let it circulate; it is making large gains, which enrich the wealthy, who can afford to wait, and confers but little benefit on the poor, who stand in need of immediate accommodation; it is incurring great hazards, when its business is intended to be conducted on slight risk and moderate profits; it is denying its assistance to those for whose benefit it was endowed with liberal powers by statute; it is making membership with its continual payments an oppression ⁴²⁸ to those to whom it was intended to be a blessing, denying them what it was meant to insure, and enforcing upon them a policy and drawing them into speculations inconsistent with their necessities and resources; and it is defrauding the state, from whom it holds its franchises for a specified end, whilst adopting the very course by which that end will most effectually be defeated of its accomplishment": Endlich on Building and Loan Associations, sec. 20.

As originally designed, their object was in the highest degree laudable, and consonant with the broadest public policy. It was these features that commended them to public favor and to the special consideration of legislatures to such an unusual degree. But building and loan associations, when used as mere depositories for the idle money of the capitalist, large or small, to be used in loans to enrich the depositor, at the expense of the needy borrower, would never have acquired the unusual rights and powers given them by the different legislatures. It has been well said that the desirableness of augmenting the proportion of landowners, and to add houses among the working classes, was such a weighty consideration that legislatures were willing, in order to effect it, to make exceptions to many of the best settled rules of policy applicable to dealings between man and man. But many of these associations have gone astray from their real purpose, and made themselves mere money lending devices; and scheme after scheme has been added to the ⁴²⁹ original plans, until their systems have become so complicated that the members do not understand them, and often are entrapped by them; and their results can only be reached, if at all, by an expert, after long and uncertain calculations. Just so far as they have held to the primary purposes of their creation and conformed to the statutes giving them extraordinary privileges, just so far ought they to be encouraged and upheld by the courts, but just so far as they depart from that original design, and fail to conform to the statutes, and make themselves mere savings banks, or loan institutions, to gather unlawful interest and entrap and oppress the needy, they should be restrained. In their original conception,

one of the leading features was, that the members were kept upon a strictly co-operative basis, with mutual advantages and benefits, and, if profits were realized, they were equally distributed between the borrowers and those who did not borrow, keeping in view all the time the primary object of furnishing homes for those who desired them. It is upon this idea that a premium over lawful interest was allowed to be paid for the loan of money, and, in order that all might stand upon the same footing, the money loaned was offered in free and fair competition and the profits earned went equally to the borrower and the member who did not borrow.

In the case of Stiles' Appeal, 95 Pa. St. 123, it is said: "Building associations are bound to offer all the money in their treasury ⁴³⁰ to open competition, so that the members may obtain the loan at a low premium if there should be no bid at a higher one. This is a most valuable feature in such associations, and hence the importance of maintaining the principle of free competition in the bids. When a member is told that there is a minimum below which loans will not be made, he must offer that amount for the loan whether any other one offers or not. If no offer to that amount is made, the money remains in the treasury without investment. It is evident that in this way members who are not borrowers will obtain a very undue advantage over the members who are borrowers. These institutions, like everything else human, are liable to abuse, and they must be guarded carefully to prevent them from being perverted into mere contrivances by which capitalists can evade the laws of usury. It was never intended originally to have classes among shareholders—one class being lenders exclusively, and the other borrowers only; one furnishing his money to be loaned for as high premium as could be secured, and the other borrowing at such rates as his necessities forced him to submit to. It may transpire that a portion of the members will never borrow, but this is a mere incident, and not a part of the original design. Hence, it is important that the premium or bonus to be paid by any member upon any advancement to him by the society should be fixed by free and open competition between all the co-operating members, and in no other ⁴³¹ way. Competition is the only way to determine what the borrower should pay. If he obtains it at a low rate, he will at last have paid more than anyone else was willing to pay, and if he gets it at a high rate he will share in the profits to the extent of his stock.

"Strict mutuality and equality of benefits and obligations must

be kept the groundwork and basis of these associations, and, if they are not so founded, they are not truly building and loan associations, entitled to the protection given such associations by the statute. If one man should loan another eight hundred dollars upon the agreement that the other would repay him one thousand dollars in monthly installments of twenty dollars, or other amounts in addition to legal interest upon the amount received, the contract would be clearly usurious. Still less inviting would the arrangement appear if the obligation of the borrower was enforced by an elaborate system of fines and forfeitures. There must, therefore, be something peculiar to the building association loan by which the debtor receives some quid pro quo in return for the onerous liabilities which he assumes, and by which the transaction, though apparently usurious and oppressive, is rendered really equitable and mutual. The mutuality lies in the fact that, after the loan, the borrower still retains his membership in the association and all the rights and privileges belonging thereto, and stands to the association in the twofold relation of debtor and member. As a debtor, he is ⁴³² bound to pay premiums, interest, and dues; as a member, he has a proportionate interest to the extent of his stock in his own payments, and whatever profits the association may make redounds to his own advantage by hastening the day of final settlement (and, we may add, increases his profits) and shortens the time to which his payments must be continued": 2 Am. & Eng. Ency. of Law, sec. 5, p. 610; *Becket v. Uniontown etc. Assn.*, 88 Pa. St. 211-216; *Security Loan Assn. v. Lake*, 69 Ala. 456.

Coming to a consideration of our own statutes, it is worthy of remark that the act of 1875, chapter 142, section 14, providing for chartering these institutions, refers to them and incorporates them as "building associations," not using the word "loan," showing the primary object of their creation: *Milliken and Ventrees' Code*, sec. 1742.

Section 1744 provides that the funds of such corporation may be loaned to the stockholders in such manner and on such terms and conditions and under such regulations as the corporation, by its constitution and by-laws, may prescribe, giving preference to stockholders.

Section 1751 provides that the loan shall be made at stated meetings, in open meeting, to the highest bidder.

Section 1754 provides that the premium thus bid shall be paid before the loan is consummated, not as part of the loan, nor as interest, but as a ⁴³³ means of determining which one of the

shareholders shall receive the loan, when there are more than one desiring it.

By the act of 1893, chapter 12, it is provided that loans may be made either in open meeting or on written application and bids. The idea of competition in such loans is carefully kept up and preserved in all the acts. It was this feature of free and open competition in securing the loans that induced this court, in the leading case of *Patterson v. Workingman's etc. Assn.*, 14 Lea, 677, to uphold such loans as not usurious and unlawful.

It is said in *Endlich on Building and Loan Associations*, section 409: "A premium, in order to be lawful, must be one that is bid for the right of precedence in taking a loan at a competitive sale, and, when there was no such sale and no bid, there can be no lawful premium. In other words, when it was simply agreed between a borrower and an association that he was to have a loan at a certain premium, not the result of any competitive sale, but of mere consent between the parties, it was held that the loan was usurious. The so-called premium, said the court, was, in fact, a part of the price named by the lender to be paid by the borrower for the use of the money loaned. The assent of the borrower to pay the price required did not make him a bidder within the meaning of the statute, and calling the rate a premium does not change the nature ⁴²⁴ of the transaction: *Bates v. People's etc. Assn.*, 42 Ohio St. 655. It is true that such a rule fixing a minimum premium will not, of itself, vitiate and avoid a loan. It must appear that the special contract was made under the rule, and that the special contract was made in compliance with the rule": *Endlich on Building and Loan Associations*, sec. 122.

But the court of chancery appeals find as a fact that it was operative in this case, and that the loan was made under and in compliance with the rule. It is said that it cannot be ascertained until the stock matures whether the complainant will pay more or less than legal interest, and, hence, the question of usury, and amount of same, cannot now be ascertained. It is also said that if the scheme is carried through as designed there will not only be no usury in the transaction, but that the borrower will have had the use of the money borrowed at a less rate than six per cent, the legal rate of interest. This, of course, contemplates the entire execution of the contract for a term of years, and makes no allowance for mismanagement, unfortunate investments, and the hundred and one contingencies that attach to all business transactions extending over a series of years. The contract, upon its face, being unauthorized, illegal, and not warrant-

ed by law, the court will not compel the borrower to continue it for years, meeting its exactions of fines and dues and interest, upon a possibility that, perchance, in the final windup, the borrower may be ⁴³⁵ shown to have paid no more than legal interest. In this connection the suggestion of the court in *Simonton v. Lanier*, 71 N. C. 498, is timely, when it is said: "It is insisted with great confidence that the rate the borrower would be required to pay, if he and his fellow borrowers would carry out their engagements, will be much less than six per cent. If that be true, no loss can come to the lender (association) if there should be a stipulation inserted in the contract that the aggregate of all sums paid by the borrower (interest being allowed to his credit) shall not exceed the sum loaned him and six per cent interest thereon. The proposition is a simple one. Let the lender corporation, which, under the guise of a building and loan association, professes to loan money in a complicated and confusing method, insert in its contract a stipulation that, in no event, will more than six per cent be exacted, and all trouble and difficulty will vanish. A contract with such stipulation was upheld in *Taylor v. Van Buren etc. Assn.*, 56 Ark. 340."

The contract upon its face appears to be usurious; whether it will prove so may not perhaps be proven until the scheme closes, but we can see that some of the compensating features, which would, under the statute, uphold it, are entirely wanting, to-wit, the right to bid in open competition for the money to be loaned, and the right of mutuality of benefits and advantages with all other members arising out of the loans and operations of the corporation. In such ⁴³⁶ case the court will set aside the unlawful contract upon such terms as may be just, and in accordance with equity, by requiring the borrower to pay back the money borrowed and legal interest, taking credit for such payments as have been made and proper interest. In this cause, complainant asks that a balance be struck between her and the company upon this basis, as of the date of the sale of the property. In her bill, she sets out her view of such account, showing amount due from her at that date of nine hundred and seventeen dollars and twenty-eight cents, counting interest both ways, which, being repaid out of the amount paid the association by the bank of twelve hundred and fifty-eight dollars upon the purchase of the property, leaves a difference of three hundred and forty dollars and seventy-two cents, and for this sum, with interest, the court of chancery appeals gave judgment. Upon the questions involved in this litigation, we cite further the following cases, where the

general purposes and proper conduct of building and loan associations are intelligently and forcibly presented: *Meroney v. Atlanta etc. Assn.*, 47 Am. St. Rep. 841, and note 873; *Bank v. Cook*, 46 Am. St. Rep. 200; *Reeve v. Ladies' Building Assn.*, 56 Ark. 335; *Endlich on Building Associations*, secs. 7, 39, notes, 40, 75, 113, 118, 120, 283, 392, 398, 413.

The scheme of the company, which is a Tennessee corporation, is not in harmony with the statutes creating it, and is unlawful and usurious. We see no error in the decree of the court of chancery appeals, and it is affirmed.

IN THE CASE of *Post v. Building etc. Assn.*, 97 Tenn. 408, the same court held that loans made by building and loan associations at a fixed premium in excess of the legal rate of interest, without free and competitive bidding, are usurious; that payment of dues upon stock in a building and loan association cannot be credited upon a usurious loan to stockholders in winding up the affairs after the association has become insolvent, because such creditors would relieve borrowing shareholders from their share of the losses and throw such losses wholly upon nonborrowing stockholders; that payment of dues in advance, under an agreement with the building and loan association for interest upon advances until they are absorbed by dues, does not entitle a stockholder, upon the insolvency of the association, to be treated as a creditor with the right to payment in advance with interest, especially when the agreement for interest was not warranted by the charter; and that a mistaken declaration of maturity of stock by a building and loan association, when the stock was, in effect, not matured, could not make the stockholder a creditor, nor put him in the position of a holder of matured stock in subsequently winding up the affairs of the association, it having become insolvent.

BUILDING AND LOAN ASSOCIATIONS proper are organizations created for the purpose of accumulating funds by monthly subscriptions or savings of members to assist them in building or purchasing real estate by loaning them the necessary money for that purpose from the funds of the society: *Meroney v. Atlanta Building etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841.

USURY.—TRANSACTIONS BETWEEN BUILDING AND LOAN ASSOCIATIONS and their borrowing stockholders are simply loans, and are usurious if they require the payment of more than the amount loaned and legal interest: *Meroney v. Atlanta Building etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841, and note. See, also, the extended notes to *Bank v. Cook*, 46 Am. St. Rep. 200, and *Robertson v. American Homestead Assn.*, 69 Am. Dec. 150.

KLEPPER v. COX.

[97 TENNESSEE, 534.]

BANKS—RECLAIMING MONEY RECEIVED WHEN INSOLVENT.—Though a bank is known by its officers to be hopelessly insolvent at a time when it received a draft from one of its customers, and issued to him therefor its own draft upon another bank, which was subsequently dishonored, such depositor cannot recover of the receiver of the insolvent bank the draft so given to him, nor the proceeds thereof, if it forwarded such draft to its correspondents in another city, and it was by the latter collected and credited to the bank whence it came before the latter suspended business. Under these circumstances, the proceeds of the draft become mingled with the general funds of the banks, and cannot be reclaimed.

BANKING—BURDEN OF PROOF.—If a person doing business with an insolvent bank, which subsequently fails, seeks to reclaim the proceeds of a check sold by it to such bank and paid for by its paper, which is afterward dishonored, on the ground that such proceeds have not been mingled with the proceeds of the bank, he must assume the burden of proof. If such check was forwarded to another bank for collection, and was by it collected and credited to the insolvent bank, and it does not appear whether the credit was made before or after the suspension of business by the latter, it is incumbent on the plaintiff suing the receiver of the insolvent bank for such proceeds to prove that they were not credited to it until after its failure.

Isaac Harr and Burrow Brothers, for Klepper.

Faw & Cox, for Cox.

535 **WILKES, J.** This bill was filed to recover from defendant, as receiver of the First National Bank of Johnson City, three hundred and sixteen dollars and thirty-six cents, proceeds of a draft or check of the bank on its correspondent bank in Louisville, Kentucky, and the further sum of forty-one dollars and seventy-five cents deposited in cash in the Johnson City bank on the day of its failure. The chancellor granted the relief prayed as to the check, but declined to give any relief as to the forty-one dollars and seventy-five cents cash. The court of chancery appeals reversed the decree of the chancellor and dismissed complainant's bill, denying him any relief, and he has appealed and assigned errors.

The theory of the bill is, that the bank at Johnson City was hopelessly insolvent when it issued its check on the Louisville bank and received the cash deposit of forty-one dollars and seventy-five cents, and this fact was well known to its president and officers, and constituted a fraud upon complainant, and that he has a right to rescind the transaction and recover back the money from the receiver, inasmuch as there was more than enough cash in the vaults of the bank, which went into the receiver's hands when it failed, to repay the amounts claimed, or that it may re-

claim the draft given in exchange for the check on Louisville. The court finds as a fact that the officers of the bank did know of the insolvency of the bank at the time of the transaction. The facts, so far as ⁵³⁶ material to be stated, are that on November 10, 1894, complainant delivered to the Johnson City bank a draft of the United States Leather Company, drawn on a New York bank, for three hundred and seven dollars and ten cents, and with this and nine dollars and six cents in cash it obtained and received from the Johnson City bank its check or draft on the German National Bank of Louisville for three hundred and sixteen dollars and thirty-six cents. It immediately transmitted the draft of the leather company to its New York correspondent, and it was placed to its credit in the New York bank, in its usual course of business, on November 12, 1894, but at what hour does not appear. About noon on that day, the Johnson City bank ceased to do business, closed its doors, and went into the hands of defendant, as receiver. The draft on the Louisville bank was not paid, but protested. The deposit of forty-one dollars and seventy-five cents was made about an hour before the bank suspended. The New York bank was indebted to the Johnson City bank, when the latter closed its doors, in the sum of five thousand six hundred and forty-four dollars and sixty-seven cents, and afterward paid the receiver four thousand eight hundred and seventy-three dollars and three cents of this amount, retaining seven hundred and seventy-one dollars and sixty-four cents on account of some rediscounts on which the Johnson City bank was indorser. When the draft was drawn on the Louisville bank, November 10, 1894, the Johnson City bank was overdrawn with it fifty-one dollars and fifty-five cents, but on November 12th when the failure occurred, it had to the credit of the Johnson City bank one hundred and thirteen dollars and sixty-five cents.

The court of chancery appeals finds as a fact that the parties treated the deposit of the leather ⁵³⁷ company's draft and the issuance of the draft on Louisville as cash transactions, and the leather company's draft was remitted by the Johnson City bank to its New York correspondent as cash and for its credit, and not simply as a collection. The real matter presented and insisted upon in this court and in the court of chancery appeals is that the Johnson City bank was hopelessly insolvent and known by its officers to be so when the transaction took place with it, and the contention is made that this constituted fraud, and that complainant is entitled to recover the amount of the leather company's check out of the proceeds which came into the hands of

the receiver from the New York bank. Put into other language, the contention is, that it was a fraud to receive the check under the circumstances, and hence the receiver holds the fund in trust, and complainant has a right to follow and reclaim the amount of the check in preference to other creditors. We have held, in cases somewhat similar to this, that by transactions as here detailed the relation of debtor and creditor was created between the customer and the bank, and in such cases the customer cannot follow and reclaim the proceeds of the check or the money, when it has been collected or credited before the bank closed: *Aiken v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921; *Sayles v. Cox*, 95 Tenn. 579; 49 Am. St. Rep. 940.

An earnest argument is made, however, that the question and effect of the fraud practiced in making ⁵³⁸ such transaction when the bank was in a known state of utter insolvency was not passed upon or considered in these cases, and that the consequence of such fraud must be to warrant the customer in rescinding the transaction and reclaiming his property. It is likened to the case of a vendor who has been induced by fraud to part with his goods. In such case he may reclaim them in the hands of the vendee if he can find and identify them: *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630; or against an assignee under a voluntary assignment for the benefit of creditors and to secure pre-existing debts: *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630.

This rule obtains upon the idea that the identical goods or property can be traced in kind into the hands of the assignee, and that they have not been mixed or confused with other goods or property of like kind. But does the rule apply in a case like the present? The transaction between the complainant in this case and the bank was, in effect, that complainant sold to the bank the check of the leather company, and purchased from the bank its own check upon the Louisville bank. At the same time the Johnson City bank became, by the same transaction, the owner of the leather company's check, and at once remitted it for credit on its own account to its New York correspondent, and it was received and credited as cash by the New York bank upon its arrival.

There is no question now made as to the real cash passing in the transaction, but the effort is to ⁵³⁹ reclaim the proceeds of the leather company's check out of the funds turned over to the receiver by the New York bank, after he took charge.

There are two determining questions arising under the state-

ment of facts: 1. Whether the proceeds of the check can be traced and identified; and 2. Whether the credit was given to the Johnson City bank by the New York bank before the failure of the former. If such credit was entered before the Johnson City bank failed, then the proceeds became mingled with the general funds of the banks, and cannot be reclaimed: *Aiken v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921; *Sayles v. Cox*, 95 Tenn. 579; 49 Am. St. Rep. 940. In such case the proceeds cannot be followed, separated, or identified. The credit in this case was given by the New York bank on the same day the Johnson City bank failed; which was first, in point of time, does not appear.

Under this state of facts, in the absence of proof to the contrary, the identification not being made out, and in favor of the other creditors of the bank seeking a pro rata distribution of its assets, we must presume that the credit was given before the Johnson City bank failed, and, this being so, the proceeds of the check cannot be identified or separated, and the right to reclaim them is lost, and the decree of the court of chancery appeals is affirmed.

QUESTIONS SIMILAR TO THOSE INVOLVED in the principal case were considered by the same court in *Bruner v. Bank*, 97 Tenn. 540, in *Showalter v. Cox*, 97 Tenn. 547, in *Friberg v. Cox*, 97 Tenn. 550, and in *Williams v. Cox*, 97 Tenn. 555. In the first of these cases, it appeared that the bank officials were guilty of fraud in receiving deposits and withholding knowledge of the insolvency of the bank, which was then well known to them. The deposit consisted of checks and also of actual cash. Some of the checks were forwarded to another bank for collection, and were collected by it and credited to the insolvent bank, part of the credits being apparently made before, and others after, it had closed its doors. It was held that when a bank "ceased to do business, the status of each and every creditor is immediately fixed. After that time a correspondent bank has no power to so deposit or credit funds received for the account of the insolvent bank as to affect the rights of customers or creditors of the insolvent bank." It was therefore held that the checks thus collected and credited to the insolvent bank, after it had closed its doors, could be reclaimed by the owners thereof, but that the balance of the funds must be regarded as mingled with the assets of the bank, and not susceptible of reclamation. In the *Showalter* case, it appeared that the complainant had delivered to the insolvent bank a check drawn against the Bank of Clinch Valley of Tazewell, Virginia. The check was sent by the insolvent bank to the bank on which it was drawn by letter with instructions to remit in New York exchange. This letter, though commenced by the president of the bank, was finished and signed by the national bank examiner, who had taken the bank in charge, it having closed its doors on the day the check was received, and very soon thereafter. The proceeds of the check were remitted to the receiver of the insolvent bank. It was held that, under these circumstances, the check remained the property of the person depositing it, and that the receiver was liable to him for the proceeds. In the *Friberg* case, the check in controversy was indorsed and delivered to the insolvent bank, and the indorser re-

ceived in return therefor about forty dollars in cash and certificates of deposit for one hundred and seventy-five dollars and a credit on the account of Ward & Friberg of the balance, the indorser having agreed to lend that sum to that firm. The check was sent to the Southern National Bank of New York, and was by it collected and credited to the insolvent bank on November 12, 1894, but whether before or after the failure of the insolvent bank on that day did not appear. The trial court found, however, that the check was delivered to, and accepted by, the insolvent bank, and cashed. It was held under these circumstances that the proceeds of the check could not be reclaimed, and that the transaction established the relation of debtor and creditor between the bank and the other persons named. The court also presumed, there being no evidence upon the subject, that the credit by the New York bank to the insolvent bank occurred before the latter closed its doors and ceased doing business. In the Williams case he sent to the insolvent bank a check, asking that the amount thereof be placed to his credit. The receipt of the check was acknowledged on November 12, 1894, and the amount thereof credited to the plaintiff, Williams, and he was notified of such credit by mail. The check was forwarded by the bank to its correspondent in New York, and collected by it on November 14, 1894, two days after the suspension of the insolvent bank. The trial court held that the amount of the check had been credited to the complainant at his request prior to the failure of the bank, and that it thereby became the owner thereof; that subsequently the relation between it and the plaintiff was that of debtor and creditor, and therefore that the amount of the check could not be reclaimed from the receiver of the bank.

BANKS—INSOLVENCY—RECOVERY OF DEPOSIT.—A single depositor may in his own name maintain an action against the directors of an insolvent bank for the loss of a deposit caused by their fraud or mismanagement: *Tate v. Bates*, 118 N. C. 287; 54 Am. St. Rep. 719, and note. To the same effect is *Solomon v. Bates*, 118 N. C. 311; 54 Am. St. Rep. 725, and note with the cases collected.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

MERCHANTS' NATIONAL BANK v. SPATES.

[41 WEST VIRGINIA, 27.]

MUNICIPAL INDEBTEDNESS, PROHIBITION AGAINST CREATING.—Under a constitutional provision against the incurring of any indebtedness by a county which cannot be paid out of the funds on hand and the levy of the current fiscal year, orders issued by the county to a contractor in payment for the construction of a courthouse, payable out of funds to be raised from tax levies to be made in a subsequent year, are void.

THE ASSIGNOR OF A NON-NEGOTIABLE INSTRUMENT WARRANTS, by implication, that it is a valid and subsisting debt, and that the maker of the instrument is solvent, or will be when it becomes due.

THE ASSIGNOR OF A VOID COUNTY WARRANT, who indorses his name thereon, guarantees that, notwithstanding its apparent invalidity, it will be paid if the assignee uses due diligence to collect it, and, if not, that when due the assignor will refund the money paid him therefor.

STATUTE OF LIMITATIONS.—IGNORANCE on the part of the assignee of non-negotiable paper does not prevent or postpone the running of the statute of limitations against a suit to recover of the assignor the amount paid therefor, on the ground that it was invalid when sold, unless such ignorance was owing to the conduct of the assignor.

STATUTE OF LIMITATIONS.—IN AN ACTION BY AN ASSIGNEE of a county order to recover of the assignor the amount paid therefor, on the ground that it was invalid when issued, the right of action accrues immediately upon the assignment, and the statute of limitations runs from that date, though the order was not due by its terms when the assignment was made, and the assignee did not become aware, until long afterward, that it would not be paid.

THE ASSIGNEE OF A VOID COUNTY ORDER cannot recover of his assignor the amount paid therefor when no offer to return such warrant to the assignor was made for more than five years, during which time no effort was made to collect it, and it would have been paid had diligence been used toward its collection.

John Bassel and W. P. Hubbard, for the plaintiff in error.

M. M. Thompson, C. W. Lynch, and John J. Davis, for the defendant in error.

²⁸ HOLT, P. This is a suit by the bank, assignee, against Thomas S. Spates, assignor, to recover a county draft which cannot ²⁹ be collected, and recover back the money paid therefor by the bank. There was judgment below on demurrer to evidence for defendant, Spates, and the bank has appealed.

In 1887 the courthouse and jail of Roane county were destroyed by fire. On the seventh day of February, 1888, the county court made a contract with E. W. Williams to repair them for the price of twenty-one thousand eight hundred dollars, and to be completed against the fifteenth day of April, 1889. The price was to be paid in three installments, as follows: Five thousand four hundred and fifty dollars to be paid when the work was commenced; the second installment, of eight thousand one hundred and seventy-five dollars, to be paid when the work was half done; and the third installment, of eight thousand one hundred and seventy-five dollars, being the residue in full to be paid when the courthouse and jail were completed according to the plans and specifications. The first installment was to be paid in county orders, made payable out of the levy of 1888, to be delivered to Williams on the fourth day of June, 1888, and to bear interest from the date of issue. For the second installment, viz., of eight thousand one hundred and seventy-five dollars, county orders were to be issued to Williams, payable out of the levy of 1889, bearing interest, to be delivered as soon as the work was half done; and the third installment was to be paid in county orders payable out of the levy of 1890. The county paid all these orders, except two, one for one thousand dollars, which was assigned to defendant, Spates, and by him was assigned to the plaintiff, the Bank of West Virginia, on the second day of November, 1888, for the sum of nine hundred and seventy-five dollars. The other order was for one thousand dollars, and was assigned by Williams to the Merchants' National Bank of West Virginia on the ninth day of January, 1889, for the sum of nine hundred and sixty dollars. Both assignments were by indorsement in blank.

Section 8 of article 10 of the constitution prohibits the incurring of any indebtedness by a county court which cannot be paid out of the funds on hand and the levy for the current fiscal year, unless all questions connected with the contracting of such debt shall have been first submitted to a ³⁰ vote of the people,

and have received three-fifths of all the votes cast for and against the same: Code 1891, p. 46. Therefore, without such vote, a county court cannot bind the levies of future years, and the assignee of such indebtedness has no greater rights to enforce payment thereof than his assignor: *Davis v. Wayne County Court* (1893), 38 W. Va. 105. See *Beard v. Hopkinsville*, 95 Ky. 239; 44 Am. St. Rep. 222, and notes, for an exhaustive review of cases on the subject.

On the ninth day of February, 1894, the county court for the first time refused to pay these outstanding orders, and notified the assignees of such refusal.

The general issue and the statute of limitations were pleaded, the plaintiff demurred to the evidence, and the court gave judgment for the defendant.

The assignment was made on the second day of November, 1888, and this suit was commenced on the thirtieth day of March, 1894, so that if the cause of action arose at the date of the assignment, five years having elapsed before the suit was instituted, it was barred by the statute of limitations, and there could be no recovery. The case of *Mackie v. Davis*, 2 Wash. 219, 1 Am. Dec. 482, was decided in 1796, and has been a leading case in Virginia and in this state on the general doctrine of the assignment of non-negotiable instruments, and the general doctrine there discussed has from that day to this been followed, expanded, and applied in many cases. For citation and discussion of the Virginia cases, see 2 Robinson's Practice, 270, 276, et seq.; 1 Barton's Law Practice, 235, 321. As to the transfer of bills and notes by assignment, see 1 Daniel on Negotiable Instruments, 715, et seq. The assignment may be by delivery and writing the name of the assignor across the back of the instrument. This does not transfer the legal title, but the assignee, the equitable owner, may sue in his own name by virtue of the statute. The assignor warrants by implication, unless it is otherwise agreed that it is a valid and subsisting debt, and that the maker of the instrument is solvent, or will be when the claim falls due: See *Slifer v. Howell*, 9 W. Va. 391-397, and cases cited; *Jackson v. Hough*, 38 W. Va. 236. See *Nichols v. Porter*, 2 W. Va. 13; 94 Am. Dec. 501. As a general ³¹ rule, the assignee cannot recover from the assignor the amount paid for the assignment, unless due diligence is used without effect against the debtor. But in no case is it necessary to pursue the debtor, if it be clear that such pursuit would be unavailing, as if the debtor be insolvent at

the time of the assignment, or when the instrument falls due, or if it be null and void: See *Morrison v. Lovell* (1870), 4 W. Va. 346, 350. If the assignee attempts to excuse himself for not suing, then he should immediately have demanded the money from the assignor with an offer to return the instrument assigned, that the assignor might take measures to recover from the maker: *Drane v. Scholfield* (1835), 6 Leigh, 386, 394, Cabell, J.; *Wilson v. Barclay* (1872), 22 Gratt. 534, 542. See *Thompson v. Govan* (1853), 9 Gratt. 695, and cases cited 699.

It may be said that the assignor, by implication, warrants that the face of the order is a true description of its character; that it is genuine; that he is a lawful holder, having a valid title, and a right to transfer it; but that here, the county order being drawn upon and payable out of levies yet to be laid in years yet to come, thereby creating a debt without a vote of the voters of the county, and for that reason unconstitutional and void, showed upon its face that it was invalid, and not a charge upon the county, and that the plaintiff, the assignee, was presumed to know the law, and, in the absence of fraud and misrepresentation, could not recover the price paid the defendant: See *Christy v. Sullivan* (1875), 50 Cal. 337; 19 Am. Rep. 655; *Otis v. Cullum* (1875), 92 U. S. 447; *Littauer v. Goldman* (1878), 72 N. Y. 506; 28 Am. Rep. 171; 1 Daniel on Negotiable Instruments, secs. 730 a, 734 a; *Rogers v. Walsh*, 12 Neb. 28; that the assignee got all he knowingly contracted for, and therefore he cannot say he got no consideration, or that the consideration has failed, although the county order has turned out to be of no value: See *Newmark on Sales*, sec. 388, note 5. I do not deem it necessary to discuss this question further. I understand the law in this state to be that when the assignor put his name across the back of this invalid order he guaranteed that, notwithstanding its apparent invalidity, it would be paid if the assignee used due diligence to collect it, ⁸² and, if not paid when due, he would refund the money, with its interest; in other words, that he would make it good. That the assignment of the county order was a new contract, founded upon a new and valuable consideration, and that it was not rendered invalid by reason of the invalidity of the order. Such is the ruling in the case of *Morrison v. Lovell*, 4 W. Va. 346. It stands alone upon a new and separate consideration, given for a county order which was issued against law; not as evil in its nature, but only as a thing prohibited to be issued by the county court: See *Lemon v. Grosskopf*, 23 Wis. 447; 99

Am. Dec. 62, note. When the right of action accrues to the assignee to recover back his purchase money, the statute of limitations begins to run. This does not depend upon the time when a person ignorant or neglectful of his rights may come to a knowledge of them (*Thomas v. White* (1823), 3 Litt. 177; 14 Am. Dec. 56), unless such ignorance or neglect is owing to the conduct of the assignor: *Jordan v. Jordan* (1826), 4 Greenl. 175; 16 Am. Dec. 249; *Case of Broderick's Will*, 21 Wall. 503, 513; *Townsend v. Eichelberger*, 51 Ohio St. 213.

In an action for deceit in the sale of property, the cause of action accrues at the time of the completion of the sale, and the statute of limitations begins to run at once: *Rice v. White* (1833), 4 Leigh, 474. The same rule must apply in the assignment of an invalid county order. There is a breach at once of the implied warranty that it is a valid subsisting claim. The right of action accrues immediately, and the fact of the vendee's inability then to ascertain the quality or condition of the property will not change the rule: See *Buswell on Limitations of Actions*, sec. 176, and cases cited. The breach of warranty of the validity of the order then occurred. The failure of consideration may be said to be then complete, because none was received, and the right accrued to the assignee to recover back the money paid by action for money had and received: See *Jackson v. Hough*, 38 W. Va. 236. Against such demand the period under the statute of limitations is five years, and it begins on the receipt of the money, for that is the breach of the contract of implied warranty. It is not deferred until damages ensue: See 13 Am. ³³ & Eng. Ency. of Law, 722, and cases cited in note 4; 1 *Robinson's Practice*, 480. And if there is anything, such as concealment or other conduct of the assignor or other thing, that will take the case out of the statute, it can only be availed of by stating it in a replication to the plea of the statute: *Short v. McCarthy*, 3 Barn. & Ald. 626; 1 *Robinson's Practice*, 480, et seq.; *Rice v. White*, 4 Leigh, 474. See 1 *Wood's Limitations of Actions*, sec. 140; *Leather Manufacturers' Bank v. Merchants' Bank* (1888), 128 U. S. 26; *Clapp v. Pinegrove Tp.*, 138 Pa. St. 35; *Buswell on Limitation of Actions*, secs. 176, 173; *East India Co. v. Paul*, 1 Eng. L. & Eq. 44; *Angell on Limitations*, 6th ed., sec. 137, note; *Bank of United States v. Daniel*, 12 Pet. 32. The law makes no postponement, and, if the assignor's contract or conduct authorized any, the assignee must plead and prove it. The substance of the statute is, every action to recover money, which is founded on

such contract as this, shall be brought within five years next after the right to bring the same shall have first accrued: See Code 1891, c. 104, sec. 6, p. 727. This order, on its face, was not payable before the first day of August, 1889, for that was the earliest period at which the sheriff could begin to collect the levy of 1889, and out of the levy of that year it was made payable on its face. Therefore the plain meaning of the contract of assignment, taking the order as valid, would be that the assignor was not to be called on to make the order good before that date. I see no reason why, if valid, it should not be given a construction so obviously in accord with what would in that event seem to be the manifest intention of the parties. And this view is sustained by some authorities. It was assigned and accepted on the theory that it would be paid when it fell due, not before, for many of them had been paid, and the sheriff said he would pay this one: See *Calhoun v. Delhi etc. R. R. Co.* (N. Y., 1890), 24 N. E. Rep. 27. But the assignee had the right at any time to treat the order as invalid, and sue to recover back the purchase money, and this he has seen fit to do, treating the money received by the assignor as money had and received to his use, and thereby treating the implied warranty of validity as broken instant: *Jackson v. Hough*, 38 W. Va. 236. The contracting ³⁴ parties treated it in fact as a valid debt. The law says it is invalid, and it so appears upon its face, and knowledge thereof must be imputed to both the parties; hence the two different lines of argument. That part of the contract which comes in by operation of law must qualify or suppress the implication that the assignee must wait until the void order is due and payable before he can sue to recover back his money as paid without consideration: See *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26; *Keener on Quasi Contracts*, 142. Such is the rule as settled by the weight of authority as I understand it, and upon principle it seems to be well founded, although, like all general rules, liable to produce some hardship; but we must take care that hard cases do not make bad law. Without some such rule, we would be left at sea, without anything to go by except the varying circumstances of each particular case, which is tantamount to having no general rule at all. The rule, as we have seen, is subject to the exception that by contract or conduct the complete right of action may be made to accrue at a different time: See 1 *Wood's Limitations of Actions*, secs. 117-119, note 8; 1 *Robinson's Practice (New)*, 477; 2 *Robinson's Practice*, 275, 276.

I think the trouble with plaintiff's case is, that in bringing its suit it went upon that part of the contract of assignment imported into it by operation of law by reason of the invalidity of the thing assigned, giving the assignee right of action instant to recover his money back as paid without consideration, and therefore had and received by the assignor to his use, and in this I lay no stress on the mere form of the action. But when the assignee comes to answer the plea of the statute of limitations, then it wishes to go by the otherwise manifested intention of the parties that there was to be no right of recourse until the county order became due and payable, which necessarily implied that the order was treated as a valid and subsisting debt, whereas, on the contrary, such implication must be regarded as overridden by the fact that the law imputes to each of the contracting parties knowledge that the order is null and void. What facts does the evidence show which, if pleaded by replication in avoidance of the plea of the statute, could ⁸⁵ have been held sufficient? 1. The county court accepted the work, laid the levies to pay for it, paid all except this order and another of like amount, and the sheriff kept promising to pay this one until ninth day of February, 1894. The county court entered an order declining to pay this order, for the reason given that it was issued contrary to the constitution of the state, and therefore null and void; and the sheriff was directed not to pay it on pain of having the same disallowed in his settlement with the court, and of this order the plaintiff had notice. 2. That the county order in question was not payable until first day of August, 1889, that being the earliest date at which the sheriff could begin to collect the taxes of 1889, and from that date five years had not elapsed before the bringing of the suit. 3. The banks at Clarksburg were remote from the county of Roane. The assignee knew that the order was issued in violation of the state constitution, for it showed such invalidity on its face. This is imputed as matter of law, and, if the bank saw fit to let it lie for five years and five months, in the hope or expectation that it would be paid, it did it at its own risk. It knew that no suit could be maintained on it. It was therefore useless to wait until August, 1889, for the sole cause of action was the want of consideration, because the county order assigned to the plaintiff was not a valid subsisting debt at the time of the assignment. Then arose plaintiff's only cause of action, and the only one on which it based its suit, and it was not compelled to wait until August 1, 1889, to see whether the cour-

ty court would pay, without being under any legal obligation to do so; and, if the bank saw fit to do so, it did not change the time when the law says the right of action arose on the assignment of an illegal and invalid instrument, which at no time could be collected by a suit, but, if paid at all at any future time, it would be matter of favor, and not of legal right, or in discharge of any legal obligation. Can there be any question that the assignee then had the right to bring such a suit to recover back the money paid? If so, the statute then commenced to run, and, having commenced, there was nothing to stop or suspend its running: *Handy v. Smith*, 30 W. Va. 195. ³⁶ As to the assignee being remote from the county of Roane, it does not pretend that there was any fraud. There could be no concealment of the main fact. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws which control human affairs, and set up a right to open up all the transactions of the past: *Case of Broderick's Will*, 21 Wall. 503, 519.

This case does not impress me as a hard one on the assignee, quite apart from the statute of limitations; and upon an equitable view of the case, such as may properly be taken in this equitable action, I think the court was right in saying that the law of the case upon the facts proved was for the defendant. I cannot but think that if the defendant had kept the order, or it had been returned to him in 1890 or 1891, he would have got the money. He would have used ordinary diligence to collect it, and it would have been paid long before the ninth day of February, 1894, and there would have been no occasion for the order of the county court entered on that day. The evidence tends to show the assignee's neglect to obtain such voluntary payment when it was in its power to do so. It was not until February or March, 1894, that defendant was informed that the order had not been paid, and payment thereof demanded of him; and up to that time he had never seen it or heard a word about it. What has the assignee, the bank, to say upon this subject—as to the diligence used to collect this order? Some time in the latter part of 1893 or first of 1894, it was sent to the cashier of the Bank of Spencer, Roane county, who replied by letter: "You may look for the payment of it." "The sheriff says he will pay it." If there was any other effort at any other time to collect it, or to return it to the assignor and let him collect it, evidence of such fact nowhere appears.

As a matter of fact, the claim was lost by the negligence of the

assignee, and it is not against conscience that it should be the one to lose. It now says that it was not bound to take any legal steps, because, the order being invalid, such suit would have been unavailing. Granting that, why did it not make a return or a timely offer to return, the order to the assignor? See *Drane v. Scholfield*, 6 Leigh, 386, 394; *Wilson* ⁸⁷ v. *Barclay*, 22 Gratt. 534. It did neither during these five years and five months, but during the latter part of this period—say the beginning of the year 1894—wrote to the cashier of the Spencer bank to see the sheriff about it.

As a matter of law, the claim sued on is barred by the statute of limitations. In equity and good conscience it is barred because, as a matter of fact, it has been lost by the negligence of the assignee.

Judgment affirmed.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—Under a law forbidding a municipality to incur any liability for any purpose exceeding in any year the income and revenue thereof, and declaring that the trustees shall not audit any liability in excess of the available money in the treasury that may be legally appropriated for such purpose, a contract running over a number of years, and which, in the aggregate, requires the payment of more money than will be in the municipal treasury during any one year, but under which the annual payments do not exceed the income in any year is valid: *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191, and note. The subject of prohibitions against municipal indebtedness is thoroughly discussed in the extended note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229.

LIMITATIONS OF ACTIONS.—IGNORANCE does not stop the running of the statute of limitations from the time the cause accrued, unless it is occasioned by some improper conduct on the part of the defendant: Extended note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 494.

NEGOTIABLE INSTRUMENTS—LIABILITY OF ASSIGNOR OF MUNICIPAL WARRANT.—A payee of a negotiable instrument, transferring it by indorsement either before or after maturity, whether it be strictly commercial paper or not, as town orders, thereby guarantees the genuineness of the writing and the validity of the promise: *Willis v. French*, 84 Me. 93; 30 Am. St. Rep. 416, and note. The indorser of a town order, void because issued without authority, is answerable to his indorsee in an action for money had and received for the amount paid by the latter to the former thereof: *Furgeson v. Staples*, 82 Me. 159; 17 Am. St. Rep. 470.

DECK v. TABLER.

[41 WEST VIRGINIA, 332.]

RESULTING TRUST.—WHEN LAND IS PURCHASED AND PAID FOR BY ONE PERSON, but the conveyance is made to another, the law ordinarily implies a trust in favor of the former, and such payment and purchase may be proved by parol.

A RESULTING TRUST DOES NOT ARISE in favor of a person who furnishes money with which to purchase property, the conveyance being taken in the name of another, if there is a legal and moral obligation on the part of the former to provide for the latter, as where the parties are wife or child of the person whose funds have been so employed. The presumption that under such circumstances no trust was intended is one of fact, and not of law, and may be rebutted by evidence of circumstances tending to show the existence of a trust.

EVIDENCE TO ESTABLISH A RESULTING TRUST.—DECLARATIONS OF A HUSBAND after the death of his wife are not sufficient to establish a resulting trust in his favor in land purchased and paid for by him and by his direction conveyed to her. Statements made by both at the time of the purchase, to the effect that the husband, being in business, was afraid something might happen to him, and that she was to make a will by which the property should go to him on her death, tend to repel, rather than to establish, the existence of a resulting trust in his favor.

N. D. Baker, Jr., for the appellants.

Flick & Westenhaver, for the appellees.

333 **HOLT, P.** On appeal from a decree entered by the circuit court of Berkeley county, on the twenty-third day of January, 1895, holding that there was no resulting trust to the husband, Abraham C. Tabler, in a house and lot which he bought and paid for, but had conveyed to his wife. From this decree the defendants, Overton C. Tabler and others, heirs of Abraham C. Tabler, appealed.

In 1878, Abraham C. Tabler was married to Susan E. Deck. Both were well up in years, and neither ever had any children. She had nothing. He was fairly well to do. Shortly after, viz., on the first day of August, 1878, the husband bought of Joseph Baker Kearfoot, for the sum of fifteen hundred dollars, a house and lot on Burke street, in the town of Martinsburg, and caused Kearfoot and wife, by deed of that date, to convey the same to his wife. On the first day of April, 1887, husband and wife, by deed of that date, sold and conveyed this property to Solomon Henkle for the sum of two thousand four hundred and fifty dollars. With nineteen hundred dollars of this money the wife bought the house and lot on King street, which was conveyed to her by James H. Wolf, as executor of the will of John M. Wolf,

deceased, by deed dated the fifteenth day of February, 1887. This is the house and lot in controversy.

Susan Tabler, the wife, died in May, 1891, leaving no issue and no will. The husband, Abraham C. Tabler, continued to occupy the King street house until about the twenty-seventh day of May, 1894, when he departed this life leaving a will. The heirs at law of the wife were the plaintiffs Edward C. Deck and Frederick A. Deck, her brothers of the whole blood, and the plaintiffs William M. Deck, Sarah R. Lamar, ³³⁴ a brother and sister of the half blood, and certain children and grandchildren of her half-brother, John B. Deck, who died in 1877. By deed dated the nineteenth day of August, 1892, the half-brother, William M. Deck, and the half-sister, Mrs. Lamar, sold and conveyed all their interest in the real estate in question to the surviving husband. In the will of Abraham C. Tabler there was, inter alia, the following: "From the proceeds of the interest that I have or may have in the house and lot on King street, in Martinsburg, it is my will that the bill of Dr. N. D. Baker, due for services rendered my wife during her lifetime, be paid, and that the tombstones placed at her grave be paid out of the same fund if possible, and that the remaining portion, whatever it may be, be paid to the use and benefit of the trustees of the Trinity Episcopal Church of Martinsburg, W. Va., to use the same for the use and benefit of the church as they may wish."

This suit was brought to partition the property by selling the same and dividing the proceeds. The trustees of the church do not answer, and do not seem to set up any claim, leaving it to go, whatever the interest may be, to the heirs at law. The infant defendants answer by guardian ad litem. The adult defendants, the heirs at law of the husband, answer and say that the wife never had the beneficial ownership of the house and lot of which she died seised; that the husband bought and paid for the house and lot on Burke street; that he consented to the sale thereof to Henkle; and joined in the deed of conveyance; that the purchase money paid therefor to his wife was a trust fund remaining in her hands for the benefit of the husband, that as such trustee she bought with the trust money the house and lot on King street, taking the conveyance of the legal title to herself, but having no beneficial ownership; but at all times held the same as trustee for the use of her husband; that at the death of the wife, the legal title vested in her heirs at law as trustees for the husband; and that he occupied it as such beneficial owner.

Where land is purchased and paid for by one person, and the conveyance is taken to another, the law will imply a trust for the benefit of the former, and such purchase and ³³⁵ payment may be proved by parol: *Bank v. Carrington* (1836), 7 Leigh, 566; *Smith v. Patton*, 12 W. Va. 541; *McGinnis v. Curry*, 13 W. Va. 29-64; *Murry v. Sell*, 23 W. Va. 475. It is raised by law, from the presumed intention of the parties, and the natural equity, that he who furnishes the means to acquire the property shall enjoy its benefits: *Jackson v. Jackson*, 91 U. S. 122, 125. It goes in strict analogy to the rule of the common law that, where a feoffment was made without consideration, the use resulted to the feoffer. But it does not arise where there is an obligation, legal or moral, to provide for the grantee, as husband for wife, or parent for child; for in such case there arises the contrary presumption of a gift or advancement for the benefit of the grantee: *Dyer v. Dyer* (1788), 2 Cox, 92; 1 *White and Tudor's Leading Cases in Equity*, 314; *Lockhard v. Beckley* (1877), 10 W. Va. 87. But extrinsic evidence, either written or parol, is admissible on behalf of the father (or husband) to rebut this presumption, and to show that a trust results in his favor: *McClintock v. Loiseau*, 31 W. Va. 865, 869. The presumption is one of fact and not of law, and may be rebutted by evidence or circumstances: *Hamilton v. Steele* (1883), 22 W. Va. 348, 354. See *Pusey v. Gardner*, 21 W. Va. 469; *Sheffer v. Fetty*, 30 W. Va. 248; *Heiskell v. Trout*, 31 W. Va. 810; *Smith v. Turley*, 32 W. Va. 14. See, also, *Thornton on Gifts*, sec. 244, et seq; 10 *Am. & Eng. Ency. of Law*, 5, et seq; *Neil v. Keese* (1849), 5 Tex. 23; 51 *Am. Dec.* 746, 751, note; *Hill on Trustees*, 144; 1 *Lewin on Trusts*, 143; 1 *Perry on Trusts*, sec. 148; *Flint on Trusts*, sec. 63; *Reynolds v. Sumner* (Ill Sup. Ct., Oct. 1888), 14 N. E. Rep. 661; *Riley v. Martinelli*, 97 Cal. 575; 33 *Am. St. Rep.* 209.

The presumption of gift or advancement being a question of the purchaser's intention, it may be repelled by evidence; but by what kind of evidence? This presumption has become a well-established rule of property, and is not to be frittered away by mere refinements: *Dyer v. Dyer*, 2 Cox, 92; 1 *White and Tudor's Leading Cases in Equity*, 314, 319; *Finch v. Finch*, 15 Ves. 43, 50. Evidence antecedent to or contemporaneous with or immediately after the purchase, so as to form a part of the same transaction, may be admitted to rebut it. Subsequent declarations, except so far as they prove intentions ³³⁶ at the time, are inadmissible, for the question is not what did the wife, but what did the

husband, mean by the purchase and conveyance? See *Fowkes v. Pascoe*, L. R. 10 Ch. 343; *Brett's Cases in Modern Equity*, 275. See *Thornton on Gifts*, sec. 245, and cases in note 2, sec. 246. You have only to prove that the one advancing the money is the husband and the one receiving the conveyance is the wife. The good consideration exists, and, being a discharge of the moral obligation to support and provide for the wife, then the presumption arises, so well established as to be a landmark—a rule of property. Hence, the evidence to rebut it must be of as explicit a nature as is required to establish the resulting trust. But where there is once convincing evidence to rebut the presumption, we can no longer treat it as a presumption raised by the law, but must go into the character and sufficiency of the evidence pro and con, as establishing his intention in that behalf at the time as a question of fact.

Bearing in mind this rule, let us look into the testimony this record presents. The greater part of it—almost all of it—is made up of conversations of the husband after the death of the wife. He said he paid for it; his wife did not have five dollars when he married her; no one owned the house but himself, etc.—all of which is incompetent, and when taken into consideration has no convincing power that when the conveyance was made he then intended her to take and hold in trust for himself. We start with the concession that the husband paid the purchase money. That fact needs no further proof. There is one witness, however, who gives us what was said at the time, as tending to explain the meaning and purpose of what was done. I mean Mr. Kearfoot, from whom the Burke street property was bought, and evidently the friend and trusted adviser of both husband and wife. He says that Tabler, the husband, had a store at the time—was a retail merchant of some sort. “When I went to make the deed, he said the deed was to be made to Mrs. Tabler. Mrs. Tabler told me the deed was to be made to her; that Mr. Tabler made the deed in her name because he had a store at the time, and was fearful that something might transpire that they would ²³⁷ lose their property. The deed was to be made to her, and she was to make a will by which it was to go to the survivor; she told me afterward that she had made a will, as above stated. I was very intimate with Mr. and Mrs. Tabler. After she sold the property on Burke street, she got me to purchase for her the property on King street, I having first looked at the property for her with a view to making the purchase. I paid about nineteen hundred dollars for the

property. That was in the year 1886. After the King street property was purchased, she told me that she wished me to write her will, as she had destroyed the first one after selling the Burke street property. As to how she wanted it written she mentioned but one item she wanted put in it. That was she wished Dr. Baker to have about four hundred dollars—that is three hundred or four hundred dollars. What else she was intending to do with it she never said. She wished me to do it some time when there was no one else about the house. I went several times, but there was always somebody there. Consequently, it was never written. Mr. Tabler said that it was so fixed that in case there should be a break-up in his business they would still have a home; that the deed for the Burke street house and lot was taken in her name in order to provide against having it taken for his debts, should he fail in the business in which he was then engaged.” They were both up in years, felt themselves to be growing old, and it was her wish and his, while he could, to forestall to some extent the vicissitudes of his business and increasing years by having this property conveyed to her, thus securing to her a home and for himself a shelter in old age from financial disaster, coming, as they often do come, together. This purpose, the only one then made manifest as a part of the transaction, so far from proving, tends to repel the existence of a resulting trust; for in that event both these old people would be at the mercy of his subsequent creditors—the very thing they were aiming to provide against. And as to the will—her first will, which she destroyed—the law itself gave him, as tenant by the curtesy in her land, all that she had intended to give, viz., a life estate therein, if her husband survived ³³⁸ her. That he had, without question or disturbance, during his life. As to the second will, which she had in contemplation, she never went far enough in her disclosure of intention to Mr. Kearfoot to enable us to form anything more than the merest conjecture of what disposition she had then in her mind to make. My conjecture would be that it would have been to him for life, remainder in fee to some of her own kin and not to his. To my mind this testimony of their confidential friend tends to show, not a resulting trust to the husband, but the intention of a settlement upon the wife. They had just been married. He was engaged in the hazardous business of keeping a retail store of some kind, involving more or less the risk of failure. Fearing a loss in business, the husband, while yet solvent, and, may we not say, with commendable prudence, saw

fit to provide a home for his wife by settling upon her a part of his real estate. She dealt with it and claimed it as her own during a period of fourteen years without contradiction, devised it as her own with his consent, sold and conveyed the Burke street house, he joining in the deed, used a part of the proceeds for her own purposes, and invested the residue in the King street house, which she caused to be conveyed in fee simple to herself. The rights of no creditors, prior or subsequent, are involved; and, as we have already seen, no express trust was created or assumed, and no confidence reposed in her by her husband was abused. There is no room, anywhere in the case, as made, for treating her as a trustee *ex maleficio*.

We have been referred to four cases as identical in all material respects with the case in hand, in each of which there was held to be a resulting trust. In *Cotton v. Wood* (1868), 25 Iowa, 43, the court found that the land bought by the husband was conveyed to the wife under the express parol agreement that she should convey the same to him on request. A resulting trust can only arise by operation of law. In *Wallace v. Bowen* (1856), 28 Vt. 638, the proof satisfied the court that the deed to the wife was not intended as an absolute gift. The statement of the case shows that the deed was directed to be made to the wife under a mistake of the legal effect of such conveyance to ³³⁹ the wife. In *Farley v. Blood* (1854), 30 N. H. 354, 372, the court found the fact to be that Farley, who held the legal title as trustee, was to hold it for Mrs. Blood, the wife of the purchaser, only to furnish the wife, Mrs. Blood, a home during her life, and that it was held in trust for the husband after the death of the wife. In *Milner v. Freeman* (1882), 40 Ark. 62, the court held that the proof was satisfactory that Milner, the husband, did not intend an absolute gift of the land to the wife. The case was regarded as very much like *Wallace v. Bowen*, 28 Vt. 638. In this case the avowed purpose of the husband in having their home conveyed to his wife was to put it beyond the reach of possible subsequent creditors, should financial shipwreck ultimately overtake him. Trusts are neither created nor implied by law to defeat the intentions of donors or settlers. They are created or implied or held to result in favor of donors or settlers in order to carry out and give effect to their true intentions, expressed or implied: *Standing v. Bowring*, L. R. 31 Ch. Div. 282. And the principle of law and presumption that a purchase in the name of a wife is *prima facie* a gift is not to be frittered away by mere refinements, for such presumption is a

rule of property so well established as to have become a landmark, and unless it is met and repelled by evidence, full, clear, and explicit, the safe thing to do is to leave the ownership where the law has placed it.

Decree affirmed.

TRUSTS—RESULTING—WHEN ARISE.—If real property is purchased and a conveyance taken in the name of one person, while the purchase money is paid by another, a resulting trust arises from the transaction in favor of the person thus paying the purchase price: *Champlin v. Champlin*, 136 Ill. 309; 29 Am. St. Rep. 323, and note; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note. See, further, the note to *Reynolds v. Sumner*, 9 Am. St. Rep. 530, and the extended note to *Neile v. Keese*, 51 Am. Dec. 752.

TRUSTS—RESULTING—WHEN DO NOT ARISE.—Where a person making a purchase of land in the name of another and paying the consideration himself is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but it will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser: *Dudley v. Bosworth*, 10 Humph. 9; 51 Am. Dec. 690; *Lislort v. Hart*, 25 Miss. 245; 57 Am. Dec. 203; *Dickinson v. Davis*, 43 N. H. 647; 80 Am. Dec. 202; extended note to *Neill v. Keese*, 51 Am. Dec. 754.

STOUT v. PHILIPPI MANUFACTURING & MERCANTILE COMPANY.

[41 WEST VIRGINIA, 339.]

APPEAL, WHO MAY TAKE.—A PURCHASER PENDENTE LITE is not entitled to appeal, he not being a formal party to the record.

APPEAL FROM A FINAL DECREE DOES NOT BRING UP FOR REVIEW any former order or decree from which a separate appeal might have been taken within a time designated, if such time has been permitted to lapse without the taking of an appeal.

LIS PENDENS.—PURCHASERS OF REAL PROPERTY AFTER THE RECORDING OF A NOTICE of *lis pendens* are as much bound by the decree as if parties to the suit.

LIS PENDENS—PURCHASERS OF REAL PROPERTY, WHEN LIABLE FOR RENTS.—Purchasers of real property, pending a suit, are liable for the rents thereof, if their purchase was made for the purpose of hindering, delaying, or defrauding creditors.

LIS PENDENS — PURCHASER, WHEN CHARGEABLE WITH FRAUD.—If the facts in the record tell a *pendente lite* purchaser that his vendor committed fraud, he becomes a party to that fraud. Hence, if he purchases under a trust deed pending a suit to set it aside for fraud, he becomes a participant in such fraud, so far as the complainants in that suit are concerned.

LIS PENDENS GIVES NOTICE ONLY OF THE FACTS CONTAINED IN THE RECORD of the suit to which it relates as it was when the party effected the purchase, and only for the purposes of that suit, and for the benefit of the parties thereto.

A MORTGAGEE IN POSSESSION OR HIS ALIENEE, not guilty of fraud, is not chargeable with rents pending a suit to foreclose a mortgage or trust deed.

FRAUD, PARTICEPS CRIMINIS.—Equity will not help one guilty of fraud against another guilty in the same transaction.

A PURCHASER OF PROPERTY AT A JUDICIAL SALE INCURS A LIABILITY for the price he agrees to pay, provided proper steps are taken to enforce it.

A PURCHASER OF PROPERTY AT A JUDICIAL SALE is not liable if it is not reported to the court, and the officer making the sale ignores it and proceeds to make another.

JUDICIAL SALE, HOW ENFORCED.—If a judicial sale is reported to, and confirmed by, the court, the purchaser may be compelled to comply with its terms, and the order of the court for such compliance may be enforced by attachment and commitment after an order of the court made directing a resale, with a provision that the purchaser shall be held responsible in case it brings less than his bid.

JUDICIAL SALE.—BEFORE DIRECTING A RESALE FOR THE PURPOSE OF CHARGING THE PURCHASER, there ought to be a report and confirmation of the sale and a rule upon him to comply with its terms, or to show cause why the property should not be resold and he held responsible for the difference between the sum at which he agreed to buy and what the property may bring at a resale.

JUDICIAL SALE — PURCHASER, WHEN NOT LIABLE FOR LOSS AT RESALE.—If, after a judicial sale, the parties agree that the property may be resold, the sale not having been reported to, nor confirmed by, the court, and upon the resale it is purchased by the purchaser at the first sale, he is not liable for the difference between the amount realized at the first and second sales.

Dayton & Dayton and F. O. Blue, for the appellant.

Samuel V. Woods, for the appellees.

⁸⁴¹ **BRANNON, J.** B. B. Stout brought a suit in equity in the circuit court of Barbour county against the Philippi Manufacturing and Mercantile Company, a corporation, and others, to recover a debt due Stout from the corporation, alleging that said corporation had become embarrassed to insolvency and that it had executed a deed of trust upon certain personal property to secure a debt to the Farmers' Bank of Philippi, and later a deed of trust upon all its real estate and machinery attached thereto, to secure various debts, in certain order, preferring a large indebtedness to said bank over Stout's debt; that both said deeds of trust, for certain reasons stated, were fraudulent and void as to creditors other than the bank; and that the bank and the trustees were participants in the fraudulent transactions culminating in and including said deeds of trust.

The bill prayed that said deeds of trust be annulled, and the properties of the corporation subjected to the payment of Stout's debt.

⁸⁴² Later, other creditors of the said corporation brought several separate suits, of like character, to recover their respective debts, and to overthrow said deeds of trust and subject the said property to their debts. These cases were jointly heard, and a decree dated the 17th of March, 1888, declared both of said deeds of trust fraudulent and void as to Stout and other general creditors of the Philippi Manufacturing & Mercantile Company, set them aside, and also the sale under one of them, and subjected the said real estate to pay certain creditors—those so suing.

The trustees in the deeds of trust and the bank were parties to these suits, and Stout recorded a notice of lis pendens of his suit, but the Douglasses were not made parties. Later, they filed a petition to be subrogated to a lien, and later still, a petition, for rehearing, but otherwise were not parties.

Pending the suits the trustees under the deed of trust conveying the real estate sold it to S. C. Douglass and T. B. Douglass, who took possession, and held under their purchase from the trustees until it was sold later by the commissioners under the decree above mentioned. Under that decree, the commissioners sold the property to S. C. Douglass, but he did not complete this sale by complying with the terms of sale prescribed by the decree, by giving notes with security; and a few days later, by consent of the parties by their attorneys, the property was resold, without advertisement or order of resale, and purchased by S. C. Douglass at a price less by twelve hundred and fifty dollars than his former bid, and this sale was reported to the court and confirmed, reserving to the creditors any right to hold Douglass for the said difference. Both sales were reported by separate reports—filed, it seems at the same time—and both heard together. Later, the Farmers' Bank of Philippi moved for a rule against Douglass to show cause why he should not be compelled to pay the said difference between his first and second bids for said property. Later, a decree was entered which required Douglass to pay the said difference, with interest; and it required S. C. Douglass and T. B. Douglass to pay fifteen hundred dollars, with interest, for rents and profits of ⁸⁴³ said mill property from the date of their purchase from the trustees to the date of S. C. Douglass' purchase of it of the commissioners under the decree.

From this last decree, dated the 24th of February, 1894, S. C. Douglass has appealed. I have stated only so much of the large record as I deem necessary to reflect the adjudication of law made in the case.

The appellant assigns errors in the first decree. Neither he nor T. B. Douglass was a formal party at its date. S. C. Douglass became quasi a party at later date, as purchaser under the decree, and the two filed two petitions, one of them asking rehearing; and S. C. Douglass became a party to the rule to compel him to pay the difference between his two bids. As such purchaser, he could not appeal from former decree: Per Miller, Judge, *Blossom v. Milwaukee etc. R. R. Co.*, 1 Wall. 655. As a pendente lite purchaser he could not appeal. Those under whom such a purchaser holds represent him: *Bennett on Lis Pendens*, sec. 325. But waiving the question whether otherwise he was such a party as can assign error in that decree, there is the bar of time; precluding review of any error in that decree—almost seven years; two years being the limitation: Code, c. 135, sec. 3. But counsel says that an appeal from a final decree brings up for review all preceding decrees out of which any error complained of in such final decree has arisen. This statement is too broad. An appeal taken in time from a decree will bring up for review every former order or decree not itself appealable, no matter when entered, and every appealable order or decree entered not more than two years before the appeal; but it will not bring up for review any appealable order or decree entered more than two years before the appeal. Nor can any error in the decree or order appealed from in time be reviewed, if that error be solely based on an appealable order or decree entered more than two years before the appeal. The error in the former decree cannot be corrected, because an appeal from that decree itself is barred; and the error in the later decree, though the appeal be within two years from its date, cannot be corrected, because that would be a reversal of the former decree, and thus nullify the statute defending its error. And furthermore, no erroneous ³⁴⁴ decree prior to such appealable former decree can be reviewed: *Tiernan v. Minghini*, 28 W. Va. 314; *Lloyd v. Kyle*, 26 W. Va. 534. The only question, then, is whether the decree of March 17, 1888, is appealable. Here we can have no trouble. That decree adjudicated the principles of the cause—its soul and substance—in adjudicating that the deeds of trust were fraudulent and void; setting them aside; setting aside the sale made under one of them to the Douglasses; decreeing debts, and their order against the property; and subjecting it to sale: *Hoy v. Hughes*, 27 W. Va. 778; *Buster v. Holland*, 27 W. Va. 510. And it just now occurs to me, as the decree requires land to be sold, it is appealable, under the letter of clause 7, section 1, chapter 135. Indeed, is it not a final decree, according to

Core v. Strickler, 24 W. Va. 689? No matter in what light we may view the decree as to the Douglasses, an appeal, when resorted to to reverse or avoid a decree, is under the limitation. For these reasons, if not for others, we cannot look into that decree of March 17, 1888.

We will now look into the decree of the 24th of February, 1894. The questions of liability for rent, and difference between S. C. Douglass' first and last bids, were not passed on in the former decree, nor did that decree settle principles touching them, or from which the liability imposed by the latter decree legally and logically resulted; and therefore any error in the latter decree imposing liability therefor does not come from the former decree, and we can review the later decree.

Are T. B. and S. C. Douglass liable for rent while they occupied under the sale under the deed of trust?

Stout recorded a notice of his pendens before the sale by the trustees, and they and the beneficiaries under the trust were parties to his suit; and, though the Douglasses were not formal parties, they are as fully bound by the decree as if parties, because pendente lite purchasers from the trustees: **Lynch v. Andrews**, 25 W. Va. 751. Just as the decree binds the trustees, so it affects the Douglasses. They stand in the shoes of the trustees, and their title perishes with the destruction of their grantor's title. Then would this principle bind them for rents? If the mill company, the debtor, had continued in possession, it could not be charged with ²⁴⁵ rents pending the suit, because, if a mortgagor or grantor in a trust deed or judgment debtor is in possession pending suit to sell the land, he is not chargeable with rent; and if the creditors are doubtful of the adequacy of their security, and want the benefit of profits until a sale can be had, they must get an order of sequestration, commonly accomplished by appointment of a receiver: **Clarke v. Curtis**, 1 Gratt. 289; **Childs v. Hurd**, 32 W. Va. 66; **Bank of Washington v. Hupp**, 10 Gratt. 23. In the last case, Judge Moncure said he thought this principle more applicable to deeds of trust than to mortgages.

It will be asked, how can the Douglasses be held for rents, if the mill company could not be? If they were purchasers without imputation of fraud, they could not be held for rents, though purchasing pending the suit: 13 Am. & Eng. Ency. of Law, 898; **Jacobs v. Smith**, 89 Mo. 673. If claiming free from fraud as alienees of the debtor, they would hold, as he, without liability for rent. A pendente lite purchaser has no privity or contract with the creditors. But entirely different is it with one purchas-

ing who is chargeable with fraud, because he is chargeable with fraud. Him equity regards with no favor, reimbursing no expenditures for purchase money or improvements, and charging him with rents of property wrongfully acquired in an effort to hinder, delay, and defraud creditors. His act hindering and delaying them in the pursuit of their debtor's property burdens him with its mesne profits. He is holding property belonging to them, and is made a trustee for them by equity, and can get no benefit from his wrong: Bump on Fraudulent Conveyances, 610, 612; Wait on Fraudulent Conveyances, secs. 26, 27.

Next, can fraud be imputed to the Douglasses? Likely not, as an actual, mental fraud in them; but in law they are chargeable with fraud, because being pendente lite purchasers, they are chargeable with everything alleged in the bill. If the facts in the record tell a pendente lite purchaser that his vendor committed fraud, he becomes a party to the fraud: Davis v. Christiar, 14 Gratt. 12, point 9. He has notice of facts disclosed by the record: Bennett on Lis Pendens, sec. 92; Arnold v. Casner, 22 W. Va. 444, point 7. Turning then to Stout's bill, we find it alleging that the deed of trust ³⁴⁶ under which the sale to the Douglasses took place was made with intent to hinder, delay, and defraud creditors, and the Douglasses must abide by the decree finding the existence of such intent. In short, the record and the decree make them in law participants in actual fraud in the conveyance: Arnold v. Casner, 22 W. Va. 444, point 7; Lynch v. Andrews, 25 W. Va. 751. So the Douglasses, as to Stout's rights, are fraudulent purchasers; but not as to the demands of other creditors who sued, as they filed no notices of lis pendens. The Stout suit was for his debt alone, was the first brought. The others were separate suits. They were heard together, and in a joint decree the fact of fraud in the deed of trust was found as to the different debts in the several suits; and, if the sale under the trust deed had been after this decree, we would have the question whether, as a pendente lite purchaser is affected with information conveyed by any part of the record, the purchasers at the trust sale would be affected with all information imparted by that decree. But the sale was before that decree, and as a lis pendens gives notice only of the facts contained in the record of the suit to which it relates, as it is when the party affected purchases, and only for the purposes of that suit, and for the benefit of parties to that suit, other creditors cannot have its benefit in other suits: Opinion in Newman v. Chapman, 2 Rand. 93; 14 Am. Dec.

774, and note; Van Fleet on Former Adjudications, secs. 539, 549; Stone v. Connelly, 1 Met. (Ky.) 652; 71 Am. Dec. 499; French v. Loyal Co., 5 Leigh, 627. And, besides this point, the sale of the mill paid the Stout debt and other assailing creditors; and, the scope of the liability imposed by the notice of *lis pendens* being satisfied, there is no ground for calling on the Douglasses to account for rent. They are not proven to have had notice in fact of fraud, but only constructively, by the effect of the notice of *lis pendens*. They are not fraudulent alienees beyond the Stout demands, and hence they fall under the rule stated above—that a mortgagor in possession, or his alienee, not guilty of fraud, is not chargeable with rents pending suit; just as the second deed of trust creditor was not held liable in *Bank of Washington v. Hupp*, 10 Gratt. 28, though he took with notice of the prior trusts, while here there is no notice. And particularly the bank ²⁴⁷ cannot ask the Douglasses to pay rent to satisfy its debts, as it is a more active agent—the primal author of the fraudulent transaction—and is convicted as such by the decree, and equity will not help one guilty of fraud against another guilty in the same transaction: *Kanawha Valley Bank v. Wilson*, 25 W. Va. 243.

Another reason against holding the Douglasses for rent is that there is no pleading on which to base it. How do we know by the pleadings that they purchased, or were in possession? No pleading mentions it, except a petition filed by them to rehear. The commissioner's report simply mentions it, but that is no pleading. I do not think this petition would make the rent matter a proper subject for relief in connection with the report.

Another question is, Can S. C. Douglass be held for the difference between the sum for which the property was knocked off to him at the first sale under the decree, and that at which he purchased at the second sale under the decree? If so, in what mode of proceeding?

Undoubtedly, when one becomes a purchaser at a judicial sale by having the property knocked off to him, he incurs a liability for the price he agreed to pay, though he does not comply with the terms of sale under the decree, as by giving notes with security, or other terms, provided proper steps be taken to enforce this liability. When the purchaser fails to comply with terms, I think the commissioner may ignore his bid, if he thinks it worthless, or for other reason does not care to insist on it, and go on and make another sale at once. But if he does this instead of report-

ing to the court, it seems he does so at his peril, where there is danger of loss to the parties: *Dills v. Jasper*, 33 Ill. 262. If he does this, we think the purchaser is not liable for his bid. But under such circumstances the sale may be reported to the court, and then several courses are open: 1. The court may set aside the sale, release the purchaser, and order a resale. This would be proper where fire or other destruction of the property rendered it proper to release the purchaser. 2. It may confirm the sale, and compel the purchaser to comply with terms of sale by paying money into court, in whole or part, as required by the ³⁴⁹ prior decree, and conform in other respects to it, and enforce its order by attachment and commitment after a rule, because the purchaser is in contempt. This course is rarely resorted to, but is clearly within the court's power. 3. It may order a resale, with the provision that the purchaser shall be held responsible in case, upon resale, it shall bring less than his bid: *Opinion, Clarkson v. Read*, 15 Gratt. 291. See elaborate note to *Mount v. Brown*, 69 Am. Dec. 365; 2 *Jones on Mortgages*, sec. 1642; 12 *Am. & Eng. Ency. of Law*, 234. Before resale, there ought to be a rule upon the purchaser to comply with the terms of sale, or show cause why it shall not be resold, holding him responsible for any difference between the sum at which he agreed to buy, and what it may bring on resale. True, he is in default, but this rule seems to be required by chancery practice. But why, when one has caused the property to be knocked down to him, must the court, to hold him responsible, in some way act on his bid? Because the court is the seller, the commissioner only its agent: *Opinions, Hyman v. Smith*, 13 W. Va. 765, and *Clarkson v. Read*, 15 Gratt. 288. The bid must be accepted by the court before the bidder can be held liable. 2 *Daniell's Chancery Practice*, 1281, speaking of steps to compel an unwilling purchaser to complete his purchase, lays it down plainly that the sale must be confirmed, as a prerequisite, as well as where the purchaser claims the property; and, if the purchaser is worthless, an order to discharge him and resell is proper. I do not think it usual here to confirm the sale in such a case. *Daniell* adds that, according to present practice in England, a more complete remedy against a purchaser refusing to fulfill his contract is by an order to resell, providing in it that the purchaser shall pay expenses arising from the noncompletion of his contract and resale, and also any deficiency in price arising on the second sale. This I think safe and proper practice here, if it is desired to hold the purchaser to his bid. There must be a

finished contract, as in other cases. I agree here with what Chancellor Bland said in a well-considered opinion in *Anderson v. Foulke*, 2 Har. & G. 353, where he said there must be a contract, and "in no case is a master or trustee authorized more than to accept ³⁴⁹ an offer or proposal to contract, which is of no sort of validity until accepted, ratified, and confirmed by the court." Before an order to resell, holding the bidder responsible, there must be a rule upon the purchaser to show cause against it: *Schaefer v. O'Brien*, 49 Md. 253, where it was held that there could not be a resale, nor could the bidder be held responsible, until the sale was reported, confirmed, and a rule to resell at the risk of the bidder, with notice to him. Just here I meet with the case of *Hill v. Hill*, 58 Ill. 239, holding it indispensable, to hold the bidder bound, to give him a rule to show cause why there should not be a resale at his risk, and that he must be given an opportunity to complete his purchase: So in *In re Yates*, 6 Jones Eq. 212. So in 2 Smith's Chancery Practice, 204. In *Dills v. Jasper*, 33 Ill. 263, held, that a bid, though accepted by the master, does not become an absolute contract until approved by the court, as the bidder only agrees to buy if the terms be approved by it, and until the sale is reported and confirmed the sale is incomplete, and the bidder under no obligation to complete the purchase; that if the bid is not reported, or approved by the court, a resale and its confirmation will operate as a rejection of the first bid, and put an end to the liability of the first bidder. (In the present case, the decree reserves right to creditors to hold Douglass responsible. Does this save the bid? Is he so far a party as to be bound by that reservation?) The practice in chancery in Illinois is, as a whole, very similar to ours.

Our own cases afford a warrant to say that a bid is but an offer, not a contract, without a recognition in some form by the court. *Kable v. Mitchell*, 9 W. Va. 493, in point 6, tells us that "the bid is to be considered as the purchaser's offer to the court, through the commissioners, and in making it he agrees to be bound thereby if it is accepted and approved by the court; and it is discretionary with the court whether it will accept the bid and confirm the sale, or set it aside": Repeated in *Marling v. Robrecht*, 13 W. Va. 440.

In this case, before any report of the first sale to the court, the parties, by counsel, agreed that a resale take place without readvertisement; and ten days after the first sale it was again sold to Douglass, but at a less price, and ³⁵⁰ the sale confirmed, with a reservation of the right to creditors to look to him for the dis-

crepancy in price between the two sales. Douglass gave to the commissioners, as his reason for not complying with his first purchase, the act of God in working a damage to the property on the night of the day of sale, by a rise in Valley river, which inundated the property. Now, had this first sale been reported to the court, and notice given Douglass of an intention to hold him to his purchase, he could have shown the facts, and asked the court to release him, and not force upon him a ruined property, or the court might have made an abatement, which I think it had power to do: *Taylor v. Cooper*, 10 Leigh, 317, 319; 34 Am. Dec. 737; cited in *Hyman v. Smith*, 13 W. Va. 767. But without report of this bid, or its acceptance by the court, or intimation of a purpose to hold him to his bid, the property is resold, by mere act of the attorneys of the parties, without advertisement. As all parties consented to a resale, Douglass could fairly infer that they recognized the injustice of confirming the sale, and agreed to disregard it. It is clear that if after sale, and before confirmation, the property is destroyed or injured, the purchaser will not be compelled to comply with his purchase, if without fault, as confirmation relates back to the moment of purchase, and the purchaser is entitled to it in its then condition: *Taylor v. Cooper*, 10 Leigh, 317; 34 Am. Dec. 737; *Hyman v. Smith*, 13 W. Va. 744.

The answer to the rule to compel Douglass to pay his first bid does not set up this defense of a freshet, but makes other defense; and there is no proof of it, unless we construe the report of the commissioners, in stating that as Douglass' reason for not completing his sale, as impliedly admitting it. But we think he is not liable, on grounds stated above.

Here, too, as in defense of the effort to charge the two Douglasses with rent, it is argued that the money for the deficiency on second sale, if charged to S. C. Douglass, would go to the bank, and that it cannot ask it, because guilty of fraud, and not entitled to call on equity for help; but this position is untenable, because this matter arises out of the sale under the decree, and the bank debts were ³⁵¹ valid, and so adjudged, while the claim for rent is under a possession under the fraudulent deed of trust, and we may, as to that, say the very possession of the purchasers under it was one given by act of the bank.

What is the proper mode of holding a bidder liable when he has failed to complete his purchase, necessitating a resale, which has brought a less price? This question has been anticipated in

what is said above, as it is there answered. It may be by rule in the same case, proceeded in as above indicated.

It seems clear to me that those clauses or provisions of the decree of the 24th of February, 1894, holding S. C. Douglass and T. B. Douglass liable for rent, and holding S. C. Douglass liable for difference in the sum for which the property was sold and confirmed to him, and his first bid therefor, are erroneous; and, in so far as the said decree so adjudicates, it is reversed.

The Law of Lis Pendens:

Necessity of the Rule.—It is absolutely essential to the complete administration of justice that the decision of courts in all proceedings before them, when they become final, shall conclude the controversy, and give to the prevailing party the redress to which he has been adjudged to be entitled. This end cannot be accomplished unless the judgment may be enforced, not only against the parties to the proceeding, but also against all other persons who have acquired during its pendency any interest in, or possession of, the subject matter of the litigation. Hence the rule which permits the enforcement of a judgment or decree, or, in other words, the reaping of the fruits thereof, notwithstanding any encumbrance, alienation, or other act, done or permitted by either party during the pendency of the suit, and which, if it were allowed the effect sought by it, would make it necessary for the successful litigant to retry the same questions against some other party.

Foundation of the Law of.—As the proceedings of courts of justice are public, and are often of general interest, it has been said that all persons are presumed to be attentive to such proceedings, and are therefore chargeable with notice thereof: *Green v. White*, 7 Blackf. 242; *Worsley v. Earl of Scarborough*, 3 Atk. 392. Therefore, the law of lis pendens has been thought to be founded upon the assumption that all persons are conclusively deemed to have knowledge of what takes place in the courts, and necessarily accept any interest which they may acquire in property in litigation with implied knowledge of such litigation and under an implied obligation to abide by the results thereof. If, however, the rules of lis pendens were based upon notice, whether express or implied, it would not be possible to apply them in those cases in which no notice could have been acquired by a pendente lite purchaser, though he, in fact, at the time of his purchase had in his mind every act or proceeding which had occurred in the courts of the country up to that moment; and there is no doubt that these rules must be applied in many instances in which no amount of attention to the proceedings of courts could have given a pendente lite purchaser knowledge that the property purchased was subject to litigation. Hence it approaches more closely to the truth to say that the law of lis pendens is not founded upon notice, either express or implied, but upon necessity, for but for that law, every litigation, however long continued, might be rendered utterly vain by the transfer of the property subject thereto to a person not a party to

the action: *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459; *Houston v. Timmerman*, 17 Or. 490; 11 Am. St. Rep. 848; *Dovey's Appeal*, 97 Pa. St. 153; *Newman v. Chapman*, 2 Rand. 98; 14 Am. Dec. 766; *Belamy v. Sabine*, 1 De Gex & J. 566. This necessity, as we have suggested, sometimes requires the application of the rule, though at the time of the transfer no notice existed among the records of the court that any action pending therein affected the property transferred. Thus, by the practice of courts of equity, the commencement of *lis pendens* dated from the service of the subpoena, though it was not returnable until the next term of the court, and therefore no examination of the records of the court prior to the commencement of that term could reveal that the rule of *lis pendens* had commenced to operate respecting the subject matter of the litigation: *Freeman on Judgments*, sec. 195. This operation of the rule may be productive of some hardship; but perhaps no rule can be devised upon any subject which will always be just, and the propriety of a law is not to be determined by inquiring whether it will in all circumstances be just, but whether, in the multitude of cases to which it must be applied, it will produce more good than evil. The necessity of the rule was well indicated, and the objections made to its application well answered in the following language found in one of the earlier opinions of Chancellor Kent: "The counsel for the defendants have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me; for if it is a well-settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpoena, might alienate his lands, and prevent the justice of the court. Its decrees might be wholly evaded. In this very case, the trustee had been charged with a gross breach of his trust, and had been enjoined by the process of the court, six months before the sale in question, from any further sales. If his subsequent sales are to be held valid, what temptation is held out to waste the trust property, and destroy all the hopes and interest of the *cestui que trust*? A suit in chancery is, in such cases, necessarily tedious and expensive, and years may elapse, as in this case, before the suit can be brought to a final conclusion. If the property is to remain all this time subject to his disposition, in spite of the efforts of the court to prevent it, the rights of that helpless portion of the community, whose property is most frequently held in trust, will be put in extreme jeopardy. To bring home to every purchaser the charge of actual notice of the suit, must, from the very nature of the case, be in a great degree impracticable": *Murray v. Ballou*, 1 Johns. Ch. 566.

To what Proceedings Applicable.—In the absence of any statutory limitation, the rule of *lis pendens* is applicable to judicial proceedings of every kind. This must be so, for if there were any such proceedings to which it was inapplicable, the parties thereto would surely destroy their effect by transfers made during the progress of the litigation. A judge, in an opinion in an American case, once stated that this rule was a purely equitable one, and was therefore recognized only in courts of equity; *King v. Bill*, 28 Conn. 593; but his decision was soon afterward overruled: *Newton v. Birge*, 85 Conn. 250. The first decision never had any support in reason or authority, and must have been a mere inadvertence, for there has at no time been any doubt of the application of the rule to proceedings at law of every character: *Secombe v. Steele*, 20 How. 94; *Bellamy v. Sabine*, 1 De Gex & J. 584; as well as to suits to condemn lands: *Roach v. Riverside etc. Co.*, 74 Cal. 263; *Plumer v. Wausan etc. Co.*, 49 Wis. 449; to contests of wills: *McIlwrath v. Collander*, 73 Mo. 105; 39 Am. Rep. 448; to proceedings to seize and administer the estates of bankrupts and insolvents; *Kimberling v. Hartley*, 1 McGrary, 136; *Hitchcock v. Sedgwick*, 2 Vern. 160; and to foreclose liens: *Wilson v. Wright*, 72 Ga. 848; *Wagner v. Smith*, 13 Lea, 560.

Statutes Modifying the Law of.—The policy prevailing in the United States of placing on record in some public place instruments affecting the title or the right of possession to real property has been extended so as to apply to actions and other proceedings whereby such title or right of possession may be affected, and by virtue of these statutes the hardship of the rule of *lis pendens* in its application to real property has been obviated, for by them purchasers and encumbrancers are exonerated from taking notice of the pendency of suits affecting real property or the right to its possession, unless some instrument is executed and recorded in the mode prescribed by the statute, and from the reading of the record of which notice is necessarily imparted of the pendency of the litigation and the parties and property affected thereby. These statutes do not create the law of *lis pendens* in the particular jurisdictions in which they are operative, but may rather be regarded as imposing limitations upon the common law otherwise existing upon the subject. In other words, the common-law rule of *lis pendens* must be regarded as in effect in each state, except in so far as it has been modified by statute. The statutes themselves are properly applicable only to proceedings in the state courts, and hence as to judicial proceedings in the various national courts held within the state, the limitations imposed by the state statutes do not prevail, and to determine who are affected by such proceedings we must still consult the common-law or equity rules applicable to *lis pendens*: *Majors v. Cowell*, 51 Cal. 481; *Wilson v. Heflin*, 81 Ind. 35. In England, it was enacted by statute 2 Victoria, chapter 1157, that no *lis pendens* shall bind a purchaser or mortgagee without express notice until a memorandum or minute thereof containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the date when the bill or information was filed,

shall be left with the senior master of the court of common pleas, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is to be affected. In the United States, the notice is usually required to be recorded in the same office in which conveyances of real estate must be recorded, but is not required to state all the particulars specified in the English statutes. It must, however, generally disclose the names of the parties to the suit and the court in which it is pending, and contain a description of the real property, the title or the right to the possession of which may be affected by the suit, and must be signed either by the party in whose behalf it is filed or by his attorney. The object of these statutes is not to relieve persons who otherwise have actual notice of the suit, and therefore, though no notice is filed, the rule of *lis pendens* remains applicable as against every purchaser or encumbrancer during the pendency of the suit having actual notice thereof: *Sampson v. Ohleyer*, 22 Cal. 200; *Abadie v. Lobero*, 36 Cal. 890; *Wise v. Griffith*, 78 Cal. 152; *Baker v. Pierson*, 5 Mich. 456; *Carr v. Cates*, 96 Mo. 271; *Wisconsin etc. R. R. Co. v. Wisconsin etc. Co.*, 71 Wis. 94; *Whiteside v. Haselton*, 110 U. S. 296. On the other hand, if no notice is filed, persons purchasing or acquiring interests in the property during the pendency of the litigation and without notice thereof are wholly unaffected by any judgment which may subsequently be rendered in the action: *Richardson v. White*, 18 Cal. 102; *Ault v. Gassaway*, 18 Cal. 205; *Jorgenson v. Minneapolis etc. Co.*, 25 Minn. 266; *Todd v. Outlaw*, 79 N. C. 235; *Abadie v. Lobero*, 36 Cal. 890; *Leitch v. Wells*, 48 Barb. 657; *Benton v. Shafer*, 47 Ohio St. 117; *Easley v. Barksdale*, 75 Va. 274; *Arnold v. Casner*, 22 W. Va. 459; *Decamp v. Carnahan*, 26 W. Va. 839; provided, the action pending or the property transferred is of such a character that the statute has required notice to be given with respect thereto. As already suggested these statutes are in their application generally restricted to actions or proceedings affecting real property or to some interest therein. Where such is the case, actions or proceedings of a different class must remain subject to the common-law rule of *lis pendens*, and the judgments therein must be given effect irrespective of transfers made *pendente lite* and whether the purchasers had notice of the pending litigation or not. In fact, the statute may be so drawn as to be restricted to a certain class of actions affecting real property only, as where a notice was required to be filed of the pendency of an action affecting the title to real estate, in which event if the action affected the possession only, the judgment may be enforced against a *pendente lite* vendee of either of the parties, though he had no actual notice of the suit, and no notice of its pendency was filed: *Long v. Neville*, 29 Cal. 131; *Sheridan v. Andrews*, 49 N. Y. 482. Suits to enforce tax liens are not affected by the statutory provisions requiring the filing of notices of the pendency of actions affecting real property for two reasons: 1. Such suits are usually commenced in the name of the sovereign authority and it is not bound by statutes unless specially named therein; and 2. The assessment and levy of taxes are matters of record authorized by law and of which all persons are conclusively presumed to have notice and such suits are but

a mode of making such assessments and levy effective: *Reeve v. Kennedy*, 43 Cal. 654; *Wright v. Walker*, 30 Ark. 44.

The rules respecting the interpretation of the record of notices of the pendency of suits are similar to those relating to other proceedings affecting the title to real property. Each notice will be considered as a whole, and inaccuracies or mistakes in one part are immaterial, if, from the writing as a whole, no doubt remains of its significance: *Watson v. Wilcox*, 39 Wis. 643; 20 Am. Rep. 63. If the litigant has done all which the statute requires him to do, he does not lose the benefit of his notice by the failure of the proper officer to index it or to properly enter it upon the records: *Haverly v. Alcott*, 57 Iowa, 171; *Heim v. Ellis*, 49 Mich. 241.

The Rule of Lis Pendens is, as to persons and property within its operation, that a court having jurisdiction of a suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of either of the parties to prevent its doing so, by any transfer or other act made or done after the service of the writ, or the happening of such other act as may be necessary to the commencement of *lis pendens*. If either of the parties assumes to make, after the law of *lis pendens* has become operative, any transfer of the subject matter of the litigation, or to create any encumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, encumbrance, or change in possession, and the final judgment or decree, when entered, may be carried into effect notwithstanding the attempted dealing with the subject matter thereof: *Moens v. Crowder*, 72 Ala. 79; *Owen v. Kilpatrick*, 96 Ala. 421; *Meux v. Anthony*, 11 Ark. 411; 52 Am. Dec. 274; *Burleson v. McDermott*, 57 Ark. 229; *Montgomery v. Byers*, 21 Cal. 107; *Hurlbutt v. Butenop*, 27 Cal. 50; *Horn v. Jones*, 28 Cal. 194; *Sharp v. Lumley*, 34 Cal. 611; *Whitney v. Higgins*, 10 Cal. 547; 70 Am. Dec. 748; *Le Roy v. Rogers*, 30 Cal. 229; 89 Am. Dec. 88; *Cheever v. Minton*, 12 Colo. 557; 18 Am. St. Rep. 258; *Norton v. Birge*, 35 Conn. 250; *Leuders v. Thomas*, 35 Fla. 518; 48 Am. St. Rep. 255; *Elizabethport etc. Co. v. Whitlock*, 37 Fla. 190; *Smith v. Corker*, 65 Ga. 461; *Bayer v. Cockerill*, 3 Kan. 282; *Kellar v. Stanley*, 86 Ky. 240; *Copenhagen v. Huffaker*, 6 B. Mon. 18; *Jackson v. Warren*, 32 Ill. 381; *Loomis v. Riley*, 24 Ill. 307; *Walker v. Douglas*, 89 Ill. 425; *Truitt v. Truitt*, 38 Ind. 16; *Barelli v. Delassus*, 16 La. Ann. 280; *Showman v. Harford*, 62 Me. 484; *Boulden v. Lanahan*, 29 Md. 200; *Walden v. Bodley*, 9 How. 34; *Shotwell v. Lawson*, 30 Miss. 27; 64 Am. Dec. 145; *Hart v. Steedman*, 98 Mo. 452; *Stevenson v. Edwards*, 98 Mo. 622; *Lincoln etc. Co. v. Rundle*, 34 Neb. 539; *Commonwealth v. Dffenbach*, 3 Grant Cas. 368; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Williams v. Kerr*, 113 N. C. 306; *Lee v. Salinas*, 15 Tex. 495; *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858; *Stout v. Philippi etc. Co.*, 41 W. Va. 339; ante, p. 843; *Gaynor v. Blewett*, 82 Wis. 313; 38 Am. St. Rep. 470; *Cohen v. Solomon*, 66 Fed. Rep. 411; *Tilton v. Coffield*, 93 U. S. 163; *Union etc. Co. v. Southern rtr. Co.*, 139 U. S. 565; *Mellen v. Moline etc. Works*, 131 U. S. 352;

858 **STOUT v. PHILIPPI MANUFACTURING ETC. Co.** [W. Virginia,

Thompson v. Baker, 141 U. S. 648; Lacassagne v. Chapuis, 144 U. S. 119. The rule is as applicable to encumbrancers as to purchasers: Masson v. Saloy, 12 La. Ann. 776; Youngman v. Elmira R. R. Co., 65 Pa. St. 278; and affects purchasers at sheriffs' sales to the same extent as if the alienation were voluntary: Fash v. Ravesties, 32 Ala. 451; Cooley v. Brayton, 16 Iowa, 10; Berry v. Whitaker, 58 Me. 422; Hall v. Jack, 32 Md. 253; Steele v. Taylor, 1 Minn. 274; Hart v. Marshall, 4 Minn. 294; Hersey v. Turbett, 27 Pa. St. 418. In McPherson v. Housel, 18 N. J. Eq. 299, it was decided that the vendee of the defendant in a foreclosure suit takes the property subject to all costs which may be made in the case, including those occasioned by an appeal prosecuted by the defendant subsequently to his conveyance. "The main purpose of the rule is to keep the subject matter of the litigation within the power of the court until the judgment or other decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgment or decree. Hence, the general proposition that one who purchases of either party to the suit the subject matter of the litigation, after the court has acquired jurisdiction, is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact": Houston v. Timmerman, 17 Or. 499; 11 Am. St. Rep. 852. *Lis pendens* is sometimes spoken of as operating as constructive notice of the suit and of the material allegations of the pleadings therein: Meyer v. Portis, 45 Ark. 420; Randall v. Duff, 79 Cal. 115; Tredway v. McDonald, 51 Iowa, 663; Jackson v. Dickinson, 15 Johns. 309; 8 Am. Dec. 236; Woodfolk v. Blount, 8 Hayw. 147; 9 Am. Dec. 736; Union etc. Co. v. Southern etc. Co., 130 U. S. 565. We have already, however, pointed out that its effect does not depend upon notice, actual or constructive, except where some statute has interposed, and has provided for the filing and recording of a notice of the suit in particular cases. The effect of the *lis pendens* is to keep the subject matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the reach of the final judgment. One acquiring an interest *pendente lite* is sometimes, on his application, permitted to appear in the action and defend or prosecute in the place of the person to whose interests he has succeeded. The court is not, however, bound to permit him to do so, in the absence of any statute conferring upon him this right. Whether, however, he appears in the cause or not, and whether he had any actual notice of its pendency or not, the judgment, when rendered, must be given the same effect as if he had not acquired his interest, or, as if he had been a party before the court from the commencement of the proceedings. His interests are absolutely concluded by the final determination of the suit: Galbreath v. Estes, 38 Ark. 599; Pickett v. Ferguson, 45 Ark. 117; 55 Am. Rep. 545; Powell v. Williams, 14 Ala. 476; 48 Am. Dec. 105; Welton v. Cook, 61 Cal. 481; Roach v. Riverside etc. Co., 74 Cal. 263; Sowden v. Craig, 26 Iowa, 156; 96 Am. Dec. 125; Gould v. Hendrickson, 96 Ill. 599; Shelton v. Johnson, 4 Sneed, 672; 70 Am. Dec. 265; Kellar v. Stanley, 86 Ky. 240; Jones v. McNarrin, 68 Me. 334; 28 Am. Rep. 66; Stevenson v. Edwards, 98 Mo. 622; Jackson v. Andrews, 7 Wend. 152;

22 Am. Dec. 574; *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858; *Edwards v. Norton*, 55 Tex. 405; *Portes v. Hill*, 30 Tex. 529; 98 Am. Dec. 481; *Union etc. Co. v. Southern etc. Co.*, 130 U. S. 565; *Mellen v. Moline etc. Works*, 131 U. S. 852. This is true whether the transfer to him is voluntary or is an attempt to secure, *pendente lite*, an attachment, execution, or other lien, or to acquire title by an execution or judicial sale; *Rider v. Kelson*, 3 Iowa, 367; *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467; *Northern Bank v. Deckebach*, 83 Ky. 154; *Kimberling v. Hartley*, 1 McCrary, 136.

Jurisdiction over the subject matter of the suit is always essential to the operation of the law of *lis pendens*. In its absence, no effect can be given to proceedings, though they purport to be judicial. Therefore, if a petition or complaint does not disclose a subject matter within the jurisdiction of the court, the proceedings cannot operate as a *lis pendens*, even from the date of the service of process: *Jones v. Lusk*, 2 Met. (Ky.) 356; *Pearson v. Keedy*, 6 B. Mon. 128; 43 Am. Dec. 160; *Benton v. Shafer*, 47 Ohio St. 129. The court may, however, have jurisdiction of the subject matter of the suit, as where it embraces movable property, and that property may be subsequently removed to another state or country wherein it may be sold to an innocent purchaser having no knowledge of the litigation affecting it. In such a case, while it would, perhaps, not be correct to aver that the court had lost jurisdiction of the subject matter of the action thus removed beyond the territorial limits of the state, it would, however, be a very great hardship to apply the rule of *lis pendens* to persons or property beyond the jurisdiction of the state or country before whose courts such property was in litigation. The majority of the decisions upon the subject hold that the rule of *lis pendens* does not operate beyond the state or country in which the action is pending, and that the judgment therein cannot be enforced as against one who purchases property subject to the action, after its removal from the state, in good faith, and without notice of the pendency of the action: *Shelton v. Johnson*, 4 Sneed, 683; 70 Am. Dec. 265; *Carr v. Lewis etc. Co.*, 96 Mo. 149; 9 Am. St. Rep. 328. It is doubtless true, as suggested in these decisions, that it would be a hardship to apply the law of *lis pendens* under the circumstances there under discussion. On the other hand, if it is not applied under such circumstances, the result will probably be to invite the parties to suits of this character to remove the subject matter thereof beyond the territorial limits of the state and to make transfers which will avoid the effect of the judgment which may finally be rendered. These considerations have led to at least one decision holding that the removal of property from the state followed by its sale does not relieve from the operation of a pre-existing suit: *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143.

To the Commencement of Lis Pendens it is Essential, both by the common law and the various statutory provisions upon the subject, that there be an action or proceeding and that it be pending in a court having jurisdiction over the subject matter thereof. Of course, if the court has not such jurisdiction, the pendency of the suit can affect no one, and therefore does not operate as a *lis pendens*. There-

fore, if an action is commenced for the recovery of real property in a county in which no part of it is situated, and the court, for that reason, has no jurisdiction of the action, a subsequent purchaser or encumbrancer is not bound by any proceeding therein nor charged with notice of the facts alleged in the pleadings: *Leavell v. Poore*, 91 Ky. 321; *Benton v. Shafer*, 47 Ohio St. 117. At the common law, something more than the commencement of the suit or action was necessary. In an action at law, it was essential that the writ be issued, and in a suit in equity that the subpoena be served, and also that the bill be filed: *Anonymous*, 1 Vern. 318. Upon the service of process, *lis pendens* began by relation as of the teste of the writ in an action at law: *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 766; and as of the date of the service of the subpoena in a suit in equity: *Goodwin v. McGehee*, 15 Ala. 232; *Majors v. Cowell*, 51 Cal. 478; *Edwards v. Banksmith*, 35 Ga. 213; *Grant v. Bennett*, 96 Ill. 513; *Wickliffe v. Breckinridge*, 1 Bush, 443; *Lyle v. Bradford*, 7 T. B. Mon. 115; *Scott v. McMillan*, 1 Litt. 302; 13 Am. Dec. 239; *Campbell's case*, 2 Bland, 209; 20 Am. Dec. 360; *Sanders v. McDonald*, 63 Md. 850; *Allen v. Mandaville*, 26 Miss. 397; *Herrington v. Herrington*, 27 Mo. 560; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Waring v. Waring*, 7 Abb. Pr. 472; *Butler v. Tomlinson*, 38 Barb. 641; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236; *Murray v. Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Staples v. Whote*, 88 Tenn. 30; *Stone v. Tyree*, 30 W. Va. 687; *Miller v. Sherry*, 2 Wall. 237; *Union etc. Co. v. Southern etc. Co.*, 130 U. S. 565; *Powell v. Wright*, 7 Beav. 444. It was not within the power of the parties, or either of them, to bring the rule into operation at an earlier day, as by the acceptance of the service of process as of some day prior to that of its actual service or acceptance: *Miller v. Kershaw*, 1 Bail. Eq. 479; 23 Am. Dec. 183. Nor could actual notice by the defendant of the pendency of the suit or any act therein have the effect of the service of the subpoena in bringing the rule into operation. Hence the reading of the bill, or a copy thereof, by one defendant to another could not put into operation the law of *lis pendens*, in advance of the service of the subpoena: *Williamson v. Williams*, 11 Lea, 355. Both at law and in equity process might be served before the bill or declaration was filed. Hence, though process was actually served and returned, there was still, in most cases, nothing upon the records of the court from which it could be ascertained what property was affected by the proceeding. Nevertheless, all persons were charged with notice of the pendency of the suit or other proceeding, and any rights acquired by them thereafter from either of the parties were subject to the final judgment or decree. In some parts of the United States, the practice still prevails of issuing and serving process before filing any complaint or other paper disclosing the subject matter and grounds of the action, but the construction of the statutes of the various states upon this subject has generally been that *pendente lite* purchasers in good faith, and without actual notice of the pendency of an action, will not be bound by the final judgment therein, if there was at the time of their purchase no complaint on file, and no notice recorded, from an inspection of which knowledge could have been acquired of the pen-

dency of the suit or of the property to be affected thereby: *Wilkinson v. Elliott*, 43 Kan. 590; 19 Am. St. Rep. 158; *Leitch v. Wells*, 48 N. Y. 611; *Sherman v. Bemis*, 58 Wis. 343; *Dawson v. Mead*, 71 Wis. 295. If the subpoena served is defective, and the service is therefore set aside, and the writ amended and served, *lis pendens* does not begin until the service of the amended writ: *Allen v. Case*, 13 Wis. 621. If constructive service of process is authorized by the publication of summons for a designated period, neither the pendency of the suit, nor the order for the service by publication, nor its partial execution puts the rule in motion: *Olevinger v. Hill*, 4 Bibb, 498; *Carter v. Mills*, 30 Mo. 432; *Cassidy v. Kluge*, 73 Tex. 154. When, however, the service is complete, the rule is called into action and is as effective as if the process had been personally served on the defendant within the territorial jurisdiction of the court: *Chaudron v. Magee*, 8 Ala. 570; *Hayden v. Bucklin*, 9 Paige, 512; *Bennett v. Williams*, 5 Ohio St. 461. In nearly all of the states, statutes have been enacted requiring a written notice to be filed in some public office of the pendency of a proceeding affecting the title or the right to the possession of real property, and where these statutes prevail, it is obvious that they must be consulted to ascertain when *lis pendens* commences. Except as against persons having actual knowledge, this day is generally that of the filing of such notice: *Roach v. Riverside etc. Co.*, 74 Cal. 263; *Wise v. Griffith*, 78 Cal. 152; *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366; *Smith v. Gale*, 144 U. S. 509. In some of the states, the statutory regulations upon the subject do not require the filing or recording of any notice in the office of the registrar of conveyances, and make the commencement of *lis pendens* date only upon the filing of a complaint in the proper office: *Burleson v. McDermott*, 57 Ark. 229; *Hayden v. Thrasher*, 28 Fla. 162; *Keith v. Losier*, 88 Iowa, 649; *Fisher v. Shropshire*, 147 U. S. 133.

We have suggested that the state statutes providing for notice of the pendency of an action to be given as therein required cannot apply to proceedings in the national courts, because the various states have no authority to prescribe rules for those courts, nor to regulate their proceedings: *Majors v. Cowell*, 51 Cal. 478; *Wilson v. Hefflin*, 81 Ind. 85; *Stewart v. Railway Co.*, 53 Ohio St. 151; *Rutherglen v. Wolf*, 1 Hughes, 78. Instances may exist in which state statutes upon the subject are inapplicable though the proceeding is in a state court. Thus, where an act of Congress provides for proceedings in a state court to determine adverse claims to public lands, it was held that such proceedings were effective upon the doing of all the acts prescribed by Congress, and therefore that all adverse claimants and their successors in interest were bound by the final judgment, though notice of *lis pendens* was not filed as prescribed for other proceedings affecting the title to real property: *People v. El Paso etc. Court*, 19 Colo. 343.

In its Territorial Operation, the rule of *lis pendens* is coextensive with the territorial jurisdiction of the court. Therefore, if a suit or action is brought in a circuit or district court of the United States, it brings within the operation of the law of *lis pendens* all property affected thereby, wheresoever situated, provided, it be not beyond the

boundaries of such district or circuit and irrespective of any state statute on the subject: *Majors v. Cowell*, 51 Cal. 478; *Wilson v. Hefflin*, 81 Ind. 35; *Stewart v. Railway Co.*, 53 Ohio St. 151; *Rutherglen v. Wolf*, 1 Hughes, 78. If a suit is in a state court, the operation of the law of *lis pendens* respecting the subject matter of that suit must extend to the boundaries of the state. Property constituting the subject matter of a pending suit may, by the party having possession thereof, be removed beyond the limits of the state or district in which the suit is pending, and it may afterward be disposed of to a purchaser in good faith and in ignorance of the pendency of the suit. We have already shown that the majority of the decisions which we have been able to discover upon this subject holds that such disposition may vest a title in the vendee which will not be affected by the judgment or decree rendered in the other jurisdiction in which the suit was pending. Public policy may, however, require the application of a reverse rule in order to discourage the removal to other jurisdictions of the subject matter of a suit. In the case of chattel mortgages, the weight of authority supports the proposition that if they are duly executed and recorded in the state wherein the property subject thereto is situate, and it is afterward removed to another state and sold to an innocent purchaser, the constructive notice imparted by the recording of the mortgage is nevertheless, deemed to extend to and against him, and to leave the property in his hands subject to the enforcement of such mortgage: *Handley v. Harris*, 48 Kan. 606; 30 Am. St. Rep. 323; *Hornthal v. Burwell*, 109 N. C. 10; 26 Am. St. Rep. 556; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62, and note 67-72. The reasons requiring the application of this rule to chattel mortgages and the property affected thereby seem equally applicable to the law of *lis pendens* and the removal from one jurisdiction to another of property, the title to which is the subject of pending litigation.

Of the Property Subject to.—We had believed until a recent date that the very decided weight of authority was to the effect that all property, the title to or the possession of which might be directly affected by judicial proceedings, other than negotiable instruments, was so far subject to the law of *lis pendens* that the final judgment or decree in such proceedings could be enforced, and in all respects given effect, notwithstanding any *pendente lite* transfer, to the same extent as if such transfer had not taken place, and therefore that personal property as well as real estate was clearly, with the exception stated, within the operation of the law of *lis pendens*. It was so held at a comparatively recent day in England: *Berry v. Gibbons*, L. R. 8 Ch. 749, note; but the holding to this effect was finally reversed on appeal. The court, after reviewing previous English decisions upon the subject, speaking by Lord Justice Lindley, said: "Upon principle and authority, I am of opinion that the doctrine in question is inapplicable to personal property, other than chattel interests in land. The inconvenience of extending the rule to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong to so extend it now for the first time, even if such extension could be justified by reasoning from well-established general propo-

sitions which might serve as premises for arriving at such a conclusion": *Wigram v. Buckley*, C. A. (1894) 3 Ch. 494. In America, on the other hand, the decided weight of authority is in favor of extending the law of *lis pendens* to personal property, and though we know of cases implying that *lis pendens* does not apply to personal property (*Miles v. Left*, 60 Iowa, 168; *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278; *Chase v. Searls*, 45 N. H. 517), we know of none in which it was necessarily so decided. There are many decisions including such property within the rule. "The rule had its origin in controversies touching real estate; but it may be conceded that at this day it applies with equal force to controversies in regard to personal property; and it is only by analogy to the law, that it is applicable to proceedings in courts of equity. Where the suit is brought to recover property, and the party is successful, the rule is one of almost universal application; the purchaser *pendente lite* takes, subject to the rights of the plaintiff, as settled by the judgment of the court. Nor can the purchaser in such case complain of the harshness of the rule, since the plaintiff, even if driven to an original action, could recover upon the strength of his title to the property, as settled by the judgment. The purchaser from the defendant, pending his suit, acquires only such title as the defendant can convey; and the judgment against the defendant is, by operation of law, a judgment, so far as it relates to the recovery of the property, against all who acquire his title or possession of the thing pending the litigation": *McCutchen v. Miller*, 31 Miss. 65, 83; *Blake v. Bigelow*, 5 Ga. 439; *Bank v. Burke*, 4 Blackf. 144. The law of *lis pendens* has, therefore, been held applicable to actions for the recovery of possession of personal property: *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98; *Carr v. Lewis etc. Co.*, 15 Mo. App. 551; to proceedings referring to negotiable notes past due: *Kellogg v. Fancher*, 23 Wis. 21; 99 Am. Dec. 96; and to purchasers *pendente lite* of patents: *Tyler v. Hyde*, 2 Blatchf. 308; to bank stock: *Leitch v. Wells*, 48 Barb. 637; to furniture: *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; to railroad bonds; *Diamond v. Laurence County*, 37 Pa. St. 353; 78 Am. Dec. 429; and to personal property sold pending a suit to foreclose a chattel mortgage thereon: *Brown v. Armstrong*, 137 U. S. 266; *Bolling v. Carter*, 9 Ala. 921.

As to Negotiable Paper before Maturity, there can be no doubt that the law of *lis pendens* ought not to, and does not, apply: *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278; *Mayberry v. Morris*, 62 Ala. 113; *Mims v. West*, 38 Ga. 18; 95 Am. Dec. 379; *Day v. Zimmerman*, 68 Pa. St. 72; 8 Am. Rep. 157; *Kellogg v. Fancher*, 23 Wis. 21; 99 Am. Dec. 96; and that where it is the subject of litigation, the courts ought to require it to be placed in their possession, or that such other measures be adopted in reference to it as may seem essential to prevent the defendant from committing any fraud upon the law by making the judgment ineffectual through the aid of transfers *pendente lite*; *Stone v. Elliott*, 11 Ohio St. 252; *Keifer v. Ehler*, 18 Pa. St. 388. The recent English decisions are well calculated to cast doubt upon the question whether personal property is subject to the law of *lis pendens*. It is, of course, argued with much force that great hardship may arise from keeping within the domain of that law per-

sonal property which is capable of being moved from place to place, and is subject to frequent sales, and concerning which there is rarely any public record of its title. Like reasons would require effect to be given to the sale of such property by a person in whose possession it is, but who is not its owner, nor authorized to sell it. Not only is personal property the subject of actions to recover possession of it, but also of suits to avoid transfers as fraudulent, and to foreclose mortgages and other liens, and these suits and actions may be rendered wholly ineffective, if transfers made pendente lite to purchasers without notice vest title in them paramount to any judgment or decree which may be subsequently entered. The same necessity, therefore, which gave rise to the rule in its application to real estate exists in the case of personal property, nor is the hardship of applying the rule in one class of property any greater than in the other.

The Property Must be Directly Affected.—Property is not subject to the law of lis pendens unless the suit or action directly affects either the title thereto or the possession thereof. It is not sufficient that the title or right of possession may be incidentally affected. Thus an action for the recovery of money may result in a judgment under which the property of the defendant may be sold, and his title thereby divested, or in a decision of some question of fact which, as between the parties, may estop either from alleging the fact to be other than it has thus been decided to be, and this estoppel may, in a subsequent action between them respecting either real or personal property, be conclusive of the title or the right of possession. The property thus indirectly affected is not, however, within the law of lis pendens so that a purchaser of it during the pendency of the first suit is bound to the same extent as are the parties thereto. If the relief sought in the action or suit includes the recovery of possession, or the enforcement of a lien, or an adjudication between conflicting claims of title, or any other judicial action affecting the title, possession, or right of possession to specific property, real or personal, or requiring its transfer or sale, then the property is so directly affected by the judgment or decree sought, that it becomes subject to the law of lis pendens: *O'Brien v. Putney*, 55 Iowa, 292; *Chaffe v. Patterson*, 61 Miss. 28; *Rosenhelm v. Harstock*, 90 Mo. 357; *Spencer v. Credle*, 102 N. C. 68; *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848. If, on the other hand, no specific property is necessarily affected by the judgment, there is nothing to which the rule of lis pendens can be applied: *Leavell v. Poore*, 91 Ky. 821, though the cause of action arose out of property described in the complaint, as where the action is to recover the value of such property or compensation for injuries thereto: *Gardner v. Peckham*, 13 R. I. 162. A proceeding to forfeit the charter of a corporation does not deprive it of the power to dispose of its property, nor does it place such property within the rule of lis pendens, so that purchasers thereof may lose the property or the right to the possession thereof through the appointment of a receiver in the proceedings: *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192. An action for trespass upon real property may render necessary the determination of the title thereto, or the location of some disputed boundary thereof, and the decision of the court

may estop the parties from relitigating the question decided. The property is not, however, so immediately affected by the action as to bind pendente lite purchasers by the final judgment: *Halley v. Ano*, 136 N. Y. 569; 32 Am. St. Rep. 764. In a suit for divorce, the pleadings may be such as to affect specific property, and therefore to call for the application of the rule of *lis pendens*, or they may be such as to afford no opportunity for its application. If there is a prayer for alimony or for any division of property, or that it be set aside for the benefit of one of the parties, but no property is specifically described, a pendente lite purchaser is not bound by the judgment, for he could not know from any inspection of the pleadings what property would be affected by the final determination of the suit: *Scott v. Rogers*, 77 Iowa, 488; *Felgley v. Felgley*, 7 Md. 537; 61 Am. Dec. 375; *Hamlin v. Bevans*, 7 Ohio, 161; 28 Am. Dec. 625; *Isler v. Brown*, 68 N. C. 556; *Brightman v. Brightman*, 1 R. I. 112; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781. If, however, the suit seeks for a division or other disposition of specific property alleged to belong to the husband or to the husband and wife, or to make the payment of alimony a charge on such property, and it is described in the complaint, it becomes subject to the final judgment in the suit, and pendente lite purchasers are bound by such judgment, and cannot successfully resist the application of the property as directed thereby: *Sapp v. Wightman*, 103 Ill. 150; *Wilkinson v. Elliott*, 43 Kan. 590; 19 Am. St. Rep. 158; *Powell v. Campbell*, 20 Nev. 232; 19 Am. St. Rep. 350; *Daniel v. Hodges*, 87 N. C. 95; *Tolerton v. Willard*, 80 Ohio St. 579; *Ulrich v. Ulrich*, 3 Mackey, 290. If there are any instances in which pendente lite transfers may prevail over such judgments, they must be confined to those cases in which the transfer is involuntary, and is brought about by some person whose rights are paramount to those of both the husband and the wife. Thus it has been held that the pendency of a suit for divorce does not deprive creditors of the husband of the remedies ordinarily afforded them for the collection of their debts, and therefore that such a creditor may, after the commencement of a suit for divorce, bring an action, recover judgment against the husband, take out execution for its satisfaction, and cause the real property to be sold thereunder, and that the purchaser at such sale takes title which cannot be affected by any judgment which may subsequently be rendered in the suit for divorce: *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848.

In one case, where it was inevitable that the proceedings, if continued to judgment, must affect the title to real property, it was, nevertheless, held not to be subject to the statute requiring the filing of a notice of the action. The statute in question declared that if the action be intended to affect real estate, the plaintiff may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of the pendency of the action, and from the time of recording only shall the pendency of the action be notice to a purchaser or encumbrancer of the property. A suit was begun for the appointment of a receiver of the property of a dissolved partnership, and the appointment was thereupon made. Afterward, cred-

itors of the partnership levied writs of attachment on its real property, and contended that such levies took precedence over the title of the receiver, because no notice was filed of the pendency of the suit in which he was appointed. The court held that the statute was inapplicable, that the suit for the appointment of a receiver was not an action intended to affect real estate within the meaning of the statute, that the actions contemplated by the statute "were those whose object was to determine the title or the rights of the parties in, to, or over some particular real estate which is the subject matter of the action. It properly includes all actions which involve and determine, as between the parties, the title to a specific tract of land, and which are brought to establish any estate, interest, or right of the parties in, to, or over the real estate described in the complaint, or to enforce any lien, charge, or encumbrance upon real estate. The application in question was clearly not an action of this kind. Its subject matter was not any specific real estate concerning their title to which, or their rights in which, the copartners were in dispute; it did not ask the court to determine any such title or rights; in deciding the matters involved in the application the judge did not, nor could he, decide or in any way determine any such right, or title, or interest of the parties to the application." The title of the receiver was therefore held to be paramount to the lien of the attaching creditors: *Longstaff v. Hurd*, 66 Conn. 850. Whether it would have been held thus paramount had the appointment of the receiver been subsequent to the levying of the writs of attachment, the court had no occasion to determine and therefore did not consider.

The Specific Property Affected by the Suit Must be Pointed Out by the pleadings or by the notice, where one is required by statute to be filed or recorded: *Oliphant v. Burns*, 146 N. Y. 218; *Spencer v. Credle*, 102 N. C. 68; *Collingwood v. Brown*, 106 N. C. 362. Though the action or suit is of such a character that it must necessarily affect the property of the parties, or some of them, yet pendente lite purchasers will not be bound by the judgment, unless the particular property is so described, either in the pleadings or notice, that an intending purchaser upon reading them or it will either be able to ascertain therefrom what property is to be affected by the judgment, or will, at least, be placed in possession of information making it his duty to prosecute further inquiries: *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192; *Coulter v. Lumpkin*, 94 Ga. 225; *Low v. Pratt*, 53 Ill. 438; *Paine v. Root*, 121 Ill. 77; *Jones v. McNarrin*, 68 Me. 334; 28 Am. Rep. 66; *Arrington v. Arrington*, 114 N. C. 151; *Lewis v. Mew*, 1 Strob. Eq. 180; *Russell v. Kirkbride*, 62 Tex. 455; *Miller v. Sherry*, 2 Wall. 237. If there are several parcels of property answering the same description, or if it appears that one or more parcels of land, including a part of a larger tract, may be affected by the suit, it is, perhaps, the duty of purchasers to make further inquiry to ascertain whether the particular parcel in which they are about to become interested is one of those sought to be affected by the suit: *Green v. Slayter*, 4 Johns. Ch. 39. At all events, reasonable certainty in the description of the subject matter of the suit is sufficient: *Arrington v. Arrington*, 114 N. C. 151. "Three facts are necessary to the existence of a valid lis pendens: 1. The property involved must

be of such a character as to be subject to the rule; 2. The court must have jurisdiction both of the person and the res; 3. The res or property involved must be sufficiently described in the pleadings. The general maxim, that that is certain which may be made certain, applies to the question whether the property is sufficiently described to create *lis pendens*. The description of the property may be such that by reference and upon inquiry it may be ascertained. It must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril; and any one reading the bill must be able to learn thereby what property is intended to be made the subject of litigation": *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233; *Lodge v. Simonton*, 2 Penr. & P. 448; 23 Am. Dec. 36.

In the case of *Gardner v. Peckham*, 13 R. I. 102, it appeared that a suit had been brought to set aside a conveyance of real property made by the complainant, and that it ultimately resulted in a decree in his favor and the restoration of the land to him. During the pendency of the suit, certain persons cut from the land a quantity of timber. The complainant, after recovering the property, brought a bill in equity against them for a discovery to ascertain the amount of the timber so cut, and to enforce payment therefor. A demurrer to the bill was sustained, partly upon the ground that the court considered that the pendency of the former suit did not necessarily affect the timber, because it was not specifically described in the bill. Surely, however, if the pleadings and notice are sufficient to charge third persons with knowledge that specific real property is affected by the pending litigation, they must be sufficient to charge them with notice that everything which constitutes a part of such realty is likewise affected. If there are fixtures or timber above the surface, or mines underneath, they are but a part of the real estate, and a *lis pendens* as to such real estate certainly must affect every part of it.

Amendments. — It is also necessary, where the pleadings are filed, that they, at the time of a *pendente lite* transfer or encumbrance, disclose the fact that the property subject thereto is involved in the pending suit. A party acquiring an interest in property during the pendency of a litigation affecting it is not thereby charged with notice of any fact that a complete knowledge of the contents of such pleadings would not disclose to him, or, at least, incite inquiry respecting. During the progress of a cause it may be found necessary to amend the pleadings to state some new cause of action, or to perfect a description of the property subject thereto, or to bring in new parties. Third persons are not charged with notice of facts brought before the court for the first time by the amendment of the pleadings made after they have acquired some interest in the subject matter of the litigation. As to any new cause of action introduced by an amendment and as to property first described thereby, there is no *lis pendens* prior to the date of the filing of the amendment: *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233; *Stone v. Connelly*, 1 Met. 652; 71 Am. Dec. 499; *Jones v. Lusk*, 2 Met. (Ky.) 356; *Clarkson v. Morgan*, 6 B. Mon. 441; *Dudley v. Price*, 10 B. Mon. 88; *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; *Wortham v. Boyd*, 66 Tex. 401. An

amendment may bring in new parties. If so, persons acquiring title from them prior to such amendment are not bound to the final judgment, and in those cases in which a notice is required to be filed or recorded in some public office the bringing in of a new party renders necessary the filing of a new notice to affect purchasers under it: *Marchbanks v. Banks*, 44 Ark. 48; *Curtis v. Hitchcock*, 10 Paige, 399. It is sometimes necessary to plead facts occurring subsequently to the filing of the original complaint and answer. If the original pleadings disclosed the property affected thereby, it became subject to respond to the final judgment or decree, and if the substantial object of the suit is not changed by the supplemental pleadings, they do not render necessary the filing of any new notice of the pendency of the action: *Stoddard v. Myers*, 8 Ohio, 203; *Gibbon v. Dougherty*, 10 Ohio St. 365. This remark is equally applicable to bills of review. If they set up matter not in issue in the original suit, then all parties coming in after the commencement of such suit are not bound by the bill of review unless made parties thereto: *Debell v. Foxworthy*, 9 B. Mon. 228.

An Amendment not Introducing a New Cause of Action or correcting a description of property or bringing before the court property of which no description has before been attempted does not require the filing of new notices of the pendency of a suit. So far as it merely perfects a cause of action stated or attempted to be stated in the original complaint, it may be regarded as taking effect by relation as of the date of the filing of such original complaint, from which date the law of *lis pendens* will operate as though a perfect complaint had been filed in the first instance: *Cotton v. Dacey*, 61 Fed. Rep. 481.

An Alienee of the Plaintiff is, like an alienee of the defendant, bound by the final judgment in the action: *Bellamy v. Sabine*, 1 De Gex & J. 590. It is not clear, however, that it is necessary in order to bind an alienee of the plaintiff that the pleadings at the time of his purchase disclose the ground of defense. In most of the statutes requiring or authorizing notice to be filed in some public office of the pendency of an action, the defendant is required to file a like notice where he interposes a cross-bill seeking some affirmative relief. In the absence of statutes of this character, it would seem that the pendency of the suit and the filing of the complaint therein would place the subject matter thereof within the operation of the law of *lis pendens* as against persons subsequently acquiring interests under the plaintiff, at least, to the extent of binding them by any judgment which might result from the defendant meeting any issue tendered by such complaint, though no answer is at the time on file. In a suit to foreclose a mortgage, the mortgagor and certain junior mortgagees were made parties defendant, and after a demurrer to the bill was overruled, the mortgagor conveyed an interest in the mortgaged premises to a third party. Subsequently, the junior mortgagees filed a cross-bill asserting the mortgages made to them, and insisting upon a foreclosure in their own behalf, and they subsequently recovered judgment for the relief prayed for. It was claim-

ed that the purchaser pendente lite was not affected by this foreclosure on the ground that no notice had been filed respecting the cross-complaint, but the court held that the defenses interposed and the action taken by the subsequent mortgagees were what might reasonably have been expected, that the cross-suit and original suit constituted but one cause, and that the notice given of the original suit was constructive notice to the parties and all persons subsequently acquiring title under them, and bound the latter by the decree finally entered, though it involved the assertion of claims held by the junior mortgagees: *Hall Lumber Co. v. Gustin*, 54 Mich. 624.

Of what Lis Pendens is Notice.—That persons acquiring interests in the subject matter of a pending litigation are bound by the judgment therein we have already shown. There are expressions of opinion to be found in the reported cases indicating that the effect of *lis pendens* is not restricted to the judgment in the action, but that, in addition thereto, it operates as constructive notice, to every person subsequently acquiring an interest in such subject matter, of the material facts disclosed in the pleadings and of those facts of which the facts so disclosed necessarily put the purchaser on inquiry: *Center v. P. & M. Bank*, 22 Ala. 743; *Randall v. Duff*, 79 Cal. 115; *Brock v. Pearson*, 87 Cal. 581; *Lockwood v. Bates*, 1 Del. Ch. 435; 12 Am. Dec. 121; *Faulkner v. Vickers*, 94 Ga. 531; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401; *Coryell v. Klehm*, 157 Ill. 462; *Jones v. McNarrin*, 68 Me. 334; 28 Am. Rep. 66; *Allen v. Poole*, 54 Miss. 333; *Turner v. Houpt*, 53 N. J. Eq. 526; *Pendery v. Allen*, 53 Ohio St. 251. It is not clear to us what is meant by these expressions. If no more is meant than that pendente lite purchasers are chargeable, for the purposes of the suit, with notice of all facts of which the record would inform them at the time of the purchase, there can be no doubt of its correctness: *Stout v. Philippi etc. Co.*, 41 W. Va. 339; ante, p. 843. Nor can there be any doubt that ignorance of any material fact so disclosed by the record cannot be successfully urged by such a purchaser for the purpose of escaping from, or limiting the effect of, the judgment finally entered in the action. Except in this restrictive sense, we doubt whether the pendency of a suit imparts constructive notice of matters disclosed by the pleadings therein. It is certain that constructive notice of matters not in issue and not pertinent to any issue, and which, therefore, cannot be determined in the action or proceeding, cannot be given by mentioning them in any pleading or other paper therein: *Page v. Waring*, 76 N. Y. 463; *Weiler v. Dreyfus*, 26 Fed Rep. 824. So it has been held that the purchaser of land subject to the lien of a mortgage is not affected by a suit where the title to the mortgage only was involved: *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760; and the general rule is, that *lis pendens* does not affect any property not necessarily bound by the suit. Hence, if money is secured by an estate, litigation about that money, not involving the estate, cannot affect a purchaser thereof: *Worsley v. Earl of Scarborough*, 3 Atk. 392. Even conceding it to be true that *lis pendens* may be notice of all facts apparent on the face of the pleadings, it cannot be notice of every equity which may by possibility arise out

of the matters in question in the suit: *Shalcross v. Dixon*, 7 L. J. Ch., N. S., 180.

Of the Persons Affected by Lis Pendens.—We have already suggested that lis pendens is notice only of the material facts disclosed by the pleadings. Facts are material in so far only as they may affect the pending suit. They are not rendered material by the fact that they may affect some future action that may be brought by one of the parties against another. Therefore, though the pleadings show that certain plaintiffs or defendants have equities as against one another, this will not affect a pendente lite purchaser with notice thereof, unless such equities are material in the pending suit. Therefore a purchaser from one of such plaintiffs or defendants is not charged with notice of the equities existing in favor of his coplaintiff or codefendant stated in the pleadings, but not constituting any part of a cause of action or a defense available in the pending action: *Bellamy v. Sabine*, 1 De Gex & J. 566. If, however, an action is such that a plaintiff or a defendant may assert a cause of action or of defense therein against his coplaintiff or codefendant, and such cause of action is disclosed by the pleadings, a pendente lite purchaser must be deemed to acquire title with notice thereof, and therefore to take title subject to any relief which may be granted based thereon between the coplaintiffs or codefendants in the suit: *Tyler v. Thomas*, 25 Beav. 47.

As a general rule, neither an action at law nor a suit in equity can conclude the rights of anyone save the parties to the action and persons in privity with them, and no one is in privity with such parties, unless his rights were derived from them, or some of them, after the commencement of the proceeding: *Freeman on Judgments*, sec. 162. As to every person whose title has not been acquired from one of the parties after the commencement of the action, its pendency cannot affect him, nor can the pleadings or any notice filed therein be regarded as constructive notice to him of any fact disclosed thereby: *Coles v. Allen*, 64 Ala. 98; *Banks v. Thompson*, 75 Ala. 531; *Bradley v. Luce*, 99 Ill. 234; *Arnold v. Smith*, 80 Ind. 417; *Newcomb v. Nelson*, 54 Iowa, 324; *Travis v. Topeka etc. Co.*, 42 Kan. 625; *Hunt v. Haven*, 52 N. H. 162; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Allen v. Morris*, 34 N. J. L. 159; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Curtis v. Hitchcock*, 10 Paige, 399; *Hopkins v. McLaren*, 4 Cow. 677; *Chapman v. West*, 17 N. Y. 125; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848; *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760; *Shaw v. Barksdale*, 25 S. C. 204; *Rodgers v. Dibrell*, 6 Lea, 69. Persons, therefore, who claim by a title not derived from any party to the suit are not bound by the judgment therein, whether their purchase was made before or after its commencement: *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760; nor is it always necessary to the operation of this rule that the interest existing at the commencement of the suit be clothed with the legal title. If the owner of the property has sold it and received payment of the purchase price, or if he for any other reason so holds it that another person is entitled to a conveyance from him of the legal title, or if he has granted any lease or made any

contract by which another person is entitled to the right of possession, none of such persons can be bound by a judgment pronounced in an action commenced after the acquisition of their equitable title or their contract rights. They may, therefore, if they have a substantial and equitable interest in the subject matter of a suit, proceed to obtain the legal title thereto from one of the parties to the suit after its commencement, and their rights cannot be impaired by any judgment subsequently entered in such action: *Rooney v. Michael*, 84 Ala. 585; *Franklin Sav. Bank v. Taylor*, 181 Ill. 376; *Clarkson v. Morgan*, 6 B. Mon. 441; *Hokanson v. Gunderson*, 54 Minn. 499; 40 Am. St. Rep. 354; *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656; *Gibler v. Trimble*, 14 Ohio, 323.

Unrecorded Conveyances.—The general rule to which we have referred may be modified by statutes and especially by statutory provisions authorizing the recording of instruments affecting the title to real property and denying effect to those which are not so recorded. In many of the states, statutes have been enacted in which in suits for partition or to foreclose mortgage or other liens the plaintiff is exonerated from making parties to the action any persons whose claims do not appear of record, and providing that the notice of the pendency of the action shall bind persons whose conveyances are not then recorded: *Lamont v. Cheshire*, 65 N. Y. 80; *Collingwood v. Brown*, 106 N. O. 362. Generally, statutes authorizing the recording of instruments affecting real property do not declare that the failure to record such instruments shall make them void between the parties thereto, nor as against any person except a purchaser or encumbrancer in good faith, for a valuable consideration, and without notice of the unrecorded conveyance. If a suit is commenced against a person who has previously made a transfer of the subject matter thereof, and the suit is prosecuted to judgment, persons purchasing from him, both in reliance upon such judgment and upon the title as it otherwise appears of record, are undoubtedly protected against unrecorded conveyances: *Freeman on Judgments*, sec. 366; *Freeman on Executions*, sec. 336; *Sprague v. White*, 78 Iowa, 670; *Hoyt v. Jones*, 31 Wis. 389. But an action may be commenced by A against B to recover real property from him, or to quiet the title, or to determine conflicting claims thereto, and after judgment has been entered in such action in favor of the plaintiff, he may convey to C. Thereupon it may be discovered that before the action was commenced against B he had executed a conveyance of the property to D, and therefore had not at any time during the pendency of the action any interest in the subject matter thereof. The question will then arise whether the judgment is effective against D who was not a party to the action. The authorities upon this subject are not at all reconcilable. The weight of authority, we think, however, supports the proposition that the judgment cannot affect D nor his successors in interest, for the reason that they have not acquired title during the pendency of the action from any party thereto, nor can persons who have subsequently purchased from A be regarded as purchasers from B so as to be protected from unrecorded conveyances made by the latter: *Warnock v. Harlow*, 98 Cal. 298; 31 Am.

872 **STOUT v. PHILIPPI MANUFACTURING ETC. Co.** [W. Virginia,

St. Rep. 209; *Smith v. Williams*, 44 Mich. 240; *Hammond v. Paxton*, 58 Mich. 393; *Vose v. Morton*, 4 Oush. 27; 50 Am. Dec. 750; *Hall v. Nelson*, 23 Barb. 88; *Masterson v. Little*, 75 Tex. 682; *Baxter v. Bartlett*, 18 Mont. 446; 56 Am. St. Rep. 594. Other cases, however, maintain the reverse of this proposition, and they are undoubtedly correct, if they arose in states whose statutes in effect provided that an instrument not duly recorded should have no effect as against persons having no actual notice thereof: *Norton v. Birge*, 85 Conn. 250; *Utey v. Fee*, 83 Kan. 688; *Smith v. Hodsdon*, 78 Me. 180; *Collingwood v. Brown*, 106 N. C. 367; *Williams v. Kerr*, 118 N. C. 306.

Involuntary Transfers Pendente Lite.—It has been said that a distinction ought to be made between voluntary transfers pendente lite and compulsory transfers made by operation of the law, as where involuntary proceedings in bankruptcy are commenced against an alleged bankrupt, as a consequence of which his property is transferred to an assignee or trustee for the benefit of creditors; and it has been held that such assignee is not chargeable with notice of the suits pending against the bankrupt, and is not bound by judgments entered against him subsequent to the commencement of the proceedings in bankruptcy: *Sedgewick v. Cleveland*, 7 Paige, 290; *Zane v. Fink*, 18 W. Va. 732. The better opinion, in our judgment, however, is that where the court has, prior to the proceedings in bankruptcy, obtained jurisdiction, it is competent to proceed to exercise it until final judgment, and that such jurisdiction is not divested by a transfer made by one of the parties as a result of proceedings against him in insolvency or bankruptcy. If such be the case, the assignee pendente lite must necessarily be bound by the judgment. Certainly this is true where the proceedings were commenced by the bankrupt himself: *Cleveland v. Boerum* 24 N. Y. 618; *Lenihan v. Hamann*, 14 Abb. Pr. N. S. 272; 55 N. Y. 652; *Young v. Cardwell*, 6 Lea, 168; *Eyster v. Gaff*, 91 U. S. 521; and we see no reason to distinguish between voluntary and involuntary proceedings. If the transfer is the result of an execution or judicial sale, there is no doubt that the purchaser thereat is within the rule of *lis pendens* to the same extent as if the transfer had been made by the debtor himself: *Scott v. Coleman*, 5 T. B. Mon. 78; *Steele v. Taylor*, 1 Minn. 278; *Hart v. Marshall*, 4 Minn. 296; *Hawes v. Orr*, 10 Bush, 431.

In an early Virginia case, it was intimated that the doctrine of *lis pendens* applied only to purchasers from the parties to the suit, and that if one of such purchasers should in turn make another conveyance, that his vendee would not be bound by the rule, for the reason that he did not obtain his title pendente lite from a party to the suit: *French v. Loyal Co.*, 4 Leigh, 627. To so hold would substantially overthrow the whole doctrine of *lis pendens*. This doctrine is founded upon the theory that the parties to the suit will not be permitted to withdraw the subject matter thereof therefrom, and thereby to prevent any efficient exercise of the jurisdiction of the court through transfers made pendente lite. If this prohibited result could be accomplished by two transfers instead of one, there would be no doubt that the operation of the law could be effectually thwarted in

many instances. We have, however, been able to find but one decision upon the subject in conflict with that just cited from the state of Virginia: *Norton v. Birge*, 35 Conn. 250.

The Prosecution of the Suit with Reasonable Diligence was, both at law and in equity undoubtedly essential to the continued operation of the law of *lis pendens*. It is difficult, and perhaps impossible, to state any inflexible rule by which it can be determined whether there has been reasonable diligence in the prosecution of a suit. Some courts are averse to the application of the law of *lis pendens*, while others are not. In some cases its application would seem to be harsh and oppressive, and in others not. Influenced by these considerations, it is quite likely that the same degree of diligence might by one court be regarded as reasonable and by another as characterized by laches. It has sometimes been said that "courts gladly avail themselves of any defect in the pleadings or proofs of the plaintiff to prevent its operation upon" a bona fide pendente lite purchaser: *Ludlow v. Kidd*, 8 Ohio, 541; and in another case it was said that the benefit of *lis pendens* can be lost only by an unusual or unreasonable delay, and not by ordinary negligence: *Gosson v. Donaldson*, 18 B. Mon. 230; 68 Am. Dec. 723. In many cases, the general statement is made that to affect such purchasers, there must be a close and continuous prosecution of the suit, an exercise of a reasonable diligence, unaccompanied with any gross slips or irregularities by which injury could accrue to the rights of interested parties: *Pipe v. Jordan*, 22 Colo. 392; 55 Am. St. Rep. 138; *Durand v. Lord*, 115 Ill. 610; *Ferrier v. Buzich*, 6 Iowa, 256; *Clarkson v. Morgan*, 6 B. Mon. 441; *Hawes v. Orr*, 10 Bush, 431; *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459; *Wallace v. Marquett*, 88 Ky. 130; *Myrick v. Selden*, 36 Barb. 22; *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700; *Trimble v. Boothby*, 14 Ohio, 109; 45 Am. Dec. 528; *Preston v. Tubbin*, 1 Vern. 286. And the prosecution of the suit must not be collusive: *Rippetoe v. Dwyer*, 65 Tex. 703. In one case, a purchaser was relieved from an enforcement of the rule because of a delay of three years in entering judgment after the filing of an answer admitting all the allegations of the plaintiff's complaint: *Erhmann v. Kendrick*, 1 Met (Ky.) 146; *Mann v. Roberts*, 11 Lea, 57; and in another instance, because there was a delay of twenty-three years during which parties were in possession of the property in controversy claiming it as their own: *Wallace v. Marquett*, 88 Ky. 130. The court may properly be influenced by the consideration that the delay in the prosecution of the suit has not only been for a long period of time, but has further been accompanied by a change in the condition and value of the property, and by the death of witnesses by whom certain facts in issue could probably have been established: *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700. In a recent case, the rule upon the subject was stated as follows: "It has been said that in order to prevent a suspension of *lis pendens*, there must be a full or continuous prosecution of the suit. But the rule in reference to a continuous prosecution simply requires that there shall be no such neglect in the prosecution as cannot be explained and appears to be

inexcusable. Mere lapse of time does not indicate such negligence. If the cause finally goes to decree or judgment, it will be presumed, in the absence of any showing that there has been a negligent intermission of the prosecution, that there has been a *binding lis pendens*, and that intervenors *pendente lite* are bound by the decree or judgment. As a general rule, there will be no estoppel against the right to enforce the *lis pendens*, unless the plaintiff or complainant in the suit has been so negligent in its prosecution as to induce the belief that such prosecution has been abandoned": *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233, 242; *Landon v. Morris*, 5 Sim. 248; *Hunter v. Earl of Hopetown*, 4 McQueen, 972. In another case it was said that: "A delay of nearly two years without a step taken in the case or a motion made indicating an intention of prosecuting the suit without an excuse offered or any explanation given for the delay is such gross and culpable negligence in their suit as to deprive them of the benefit of the rule": *Petree v. Bell*, 2 Bush, 62. In Oregon, the opinion has been expressed that: "The constructive notice which the law presumed by *lis pendens* is less reliable than any of the other kinds of constructive notice arising from registration, and, in order that the parties may be thus protected, the suit should be prosecuted with reasonable diligence and dispatch." And it appearing that after the entry of an interlocutory judgment in partition no further proceedings were taken for ten years, the court added: "After so long a lapse of time, little opportunity would be afforded a purchaser to ascertain the condition of the title which he might be looking up so far as it might be affected by the pendency of the legal proceedings, for the reason that papers are liable to be mislaid and the case omitted from the docket, and a new clerk might, in the meantime, come in who would have no personal knowledge of the former proceedings, and a purchaser under the circumstances would be very liable to fail to get information of the pendency of the case": *Bybee v. Summers*, 4 Or. 361.

New Suits—Revivor.—A suit may be dismissed or otherwise discontinued and afterward rebegun or revived, in which event two questions may be presented: 1. May the *lis pendens* of the first suit, under any circumstances, continue so as to give an added effect to the judgment in the second; and 2. If so, has there been such delay in the commencement of the second suit as to exclude it from the operation of the rule. If the judgment or decree in the first suit or action, though of such a character as not to estop plaintiff or complainant from commencing another proceeding, was entered without any reservation of the right to do so, there is no doubt that the effect of *lis pendens* terminates with the judgment therein, and hence that persons acquiring interests in the subject matter of the litigation before the commencement of the second proceeding, though during the pendency of the first, are not bound by the final judgment or decree in the second: *Herrington v. McCollum*, 73 Ill. 483; *Allison v. Drake*, 145 Ill. 500; *Watson v. Wilson*, 2 Dana, 408; 26 Am. Dec. 459; *Herrington v. Herrington*, 27 Mo. 560; *Newman v. Chapman*, 2 Rand, 93; 14 Am. Dec. 766; *Drayson v. Pocock*, 4 Sim. 284. A judgment or decree of dismissal may, however, expressly reserve to the

plaintiff or complainant the right to begin another proceeding, and then the question will arise, in the event of his availing himself of the privilege, whether persons who would have been bound by a decree on the merits in the first suit because of their purchase pendente lite are bound by such a decree in the second. This question cannot be answered with any confidence. Some of the decisions maintain that the reservation of the right continues the operation of the *lis pendens* created by the first suit, and therefore purchasers during its pendency may be deemed in the second suit to have purchased with notice thereof and of the material allegations of the bill therein: *Ferrier v. Buzick*, 6 Iowa, 258; *Bishop of Winchester v. Paine*, 11 Ves. Jr. 200; while others assert, and we think with better reason, that the dismissal of the first suit terminates the effect of the *lis pendens* created thereby, and that it cannot be revived by a second proceeding: *Pipe v. Jordan*, 22 Colo. 392; 55 Am. St. Rep. 138; *Clarkson v. Morgan*, 6 B. Mon. 441.

If There is a Mere Abatement of the Suit or Action, and the right continues in the plaintiff or complainant to revive it, its abatement does not end the *lis pendens* therein. If proceedings are taken to revive it in the mode authorized by the rules of practice prevailing in the jurisdiction wherein the suit or action is pending, and it is accordingly revived and then proceeds to final judgment or decree, all persons acquiring interests under the parties, or any of them, after the commencement of the action are bound: *Watson v. Wilson*, 2 Dana, 766; 26 Am. Dec. 459; *Newman v. Chapman*, 2 Rand. 98; 14 Am. Dec. 766. Where the right of revivor exists, it must, however, be prosecuted with reasonable diligence. Otherwise pendente lite purchasers are not bound: *Shively v. Jones*, 6 B. Mon. 274; *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700. In one state, a year has been named as a reasonable time within which proceedings to revive may be prosecuted: *Hull v. Deatly*, 7 Bush, 687; but in cases of this character as well as in others we apprehend that the question of laches cannot be determined by any invariable test, and that a person against whom unreasonable delay is charged may meet such charge by showing a reasonable excuse for his tardiness: *Wickliffe v. Breckenridge*, 1 Bush, 448.

Appellate Proceedings.—Though a final judgment or decree has been entered, the losing party has the right to seek relief therefrom by an appeal or writ of error or other appellate proceeding, and, sometimes, by a bill of review. Where the law gives a right of review to an appellate court, all persons are necessarily charged with notice thereof, and it would seem reasonable to hold that the operation of *lis pendens* ought to be adequate to give a litigant protection until he can pursue all the remedies to which he is entitled in the action, and therefore, though a judgment or decree final in form has been entered, the cause ought still to be deemed pending while the right to further prosecute it by appeal or writ of error remains. Hence, we deem it the better opinion that if an appeal be prosecuted within the time allowed by law, all persons acquiring an interest in the subject of the litigation after the commencement of

the action must be bound by such judgment as shall ultimately be rendered therein, and that this rule is applicable to persons purchasing before an appeal has, in fact, been taken, though after the entry of the judgment subsequently appealed from: *Smith v. Brittenham*, 109 Ill. 540; *Dunnington v. Elston*, 101 Ind. 373; *Real Estate etc. Inst. v. Collonious*, 63 Mo. 290; *Carr v. Cates*, 96 Mo. 271; *Macklen v. Allenberg*, 100 Mo. 837. A writ of error is in form an independent suit or proceeding. It has, therefore, been held to be subject to the rule that *lis pendens* does not begin until the service of the writ, and therefore it has been thought that a purchaser after the entry of the judgment sought to be reviewed but before the service of the writ of error was not bound by the result of the proceedings in error: *Cheever v. Minton*, 12 Colo. 559; 13 Am. St. Rep. 258; *Eldridge v. Walker*, 80 Ill. 270; *McCormick v. McClure*, 6 Blackf. 466; 39 Am. Dec. 441; *Macklin v. Allenberg*, 100 Mo. 837; *Taylor v. Boyd*, 3 Ohio, 837; 17 Am. Dec. 603; *Ludlow v. Kidd*, 8 Ohio, 541; *Woolridge v. Boyd*, 13 Lea, 151; and there have been cases extending this rule to appeals: *Cheever v. Minton*, 12 Colo. 559; 13 Am. St. Rep. 258. While there may be a difference in the forms of appellate proceedings, their object is the same, and whatever be the form of the proceeding, provided it be sanctioned by law, it seems absurd to hold that the successful litigant shall not be entitled to the fruits of the litigation because some one happened to purchase the subject matter thereof after the rendition of an erroneous judgment or decree and before proceedings had been taken to escape from it through the action of some appellate tribunal. "We cannot," said the supreme court of Illinois, "sanction the claim that where one in the actual possession of land is in good faith defending against an adverse suit for the recovery thereof, he can, merely because there has been a recovery against him in an inferior court, be deprived of all the fruits of an appeal or writ of error, by an unsuccessful claimant suddenly transferring the estate to a third party. Before the owner of a freehold estate can be compelled to surrender it to an adverse claimant, he has a right, if he desires to do so, to be heard in the highest appellate tribunal of the state, and for this purpose, where an inferior court has rendered a decision adverse to him, he must have a reasonable time, at least, to avail himself of this right": *Smith v. Brittenham*, 109 Ill. 553. Hence, we think the better opinion is that, whatever be the form of the appellate proceeding, if it be prosecuted in due time, the *lis pendens* resulting from the commencement of the suit continues until its final determination in whatsoever court that may be: *Debell v. Foxworthy*, 9 B. Mon. 228; *Clarey v. Marshall*, 4 Dana, 95; *Sarle v. Crouch*, 3 Met. (Ky.) 450; *Clark v. Farrow*, 10 B. Mon. 446; 52 Am. Dec. 552; *Ludlow v. Kidd*, 8 Ohio, 541; *Harle v. Langdon*, 60 Tex. 555; *Bishop of Winchester v. Beaver*, 8 Ves. Jr. 814.

With Respect to Bills of Review in those cases in which they are allowed by law, and all persons must be deemed to have notice what decrees are subject thereto and may be set aside thereby, there is also a difference of opinion whether one acquiring an interest in the subject of the litigation after the original decree is entered and be-

fore the bill of review is filed takes title subject to such final action as may be had under any bill of review which may be subsequently filed. Among the decisions affirming that purchasers before the bill is filed are nevertheless bound by the result thereof are *Debell v. Foxworthy*, 9 B. Mon. 228; *Clarey v. Marshall*, 4 Dana, 95; *Earle v. Crouch*, 3 Met. (Ky.) 450; *Clark v. Farrow*, 10 B. Mon. 446; 52 Am. Dec. 552; *Gore v. Stackpoole*, 1 Dow. 81; and among the decisions affirming a contrary doctrine are *Ludlow v. Kidd*, 3 Ohio, 541; *Rector v. Fitzgerald*, 59 Fed. Rep. 808; *Lee County v. Rogers*, 7 Wall. 181. If, after a judgment is entered in an action, an appeal is taken therefrom, resulting in its reversal in the appellate court, the *lis pendens* is not thereby terminated if, notwithstanding such reversal, further proceedings take place in the trial court, and ultimately result in a final judgment in favor of the plaintiff or complainant: *Daniel v. Hodges*, 87 N. C. 98; *Stoddard v. Myers*, 8 Ohio, 203.

Termination of.—Undoubtedly, there are cases affirming in general terms that *lis pendens* ceases with the entry of the final judgment or decree, and from their language the conclusion is inferable that a purchaser from an unsuccessful litigant after the entry of such judgment or decree against him is not bound thereby: *Ludlow v. Kidd*, 3 Ohio, 541; *Worsley v. Earl of Scarborough*, 8 Atk. 392; *Harvey v. Montague*, 1 Vern. 122; *Sugden on Vendors*, 1047. To so hold would render the law of *lis pendens* useless, for it would invite a litigant to avoid the decision of the court as soon as it had pronounced against him, by transferring the subject thereof. When the authorities so speak, what they must mean is, that if a suit or action is dismissed or a judgment is entered denying the relief sought, then the allegations of the pleadings no longer impart notice of their contents to persons who may afterward deal with the property referred to therein. If, on the other hand, a judgment or decree is entered for the recovery of the possession of property, or directing its transfer or sale, or otherwise necessarily affecting the title thereto or the possession thereof, such judgment or decree is binding upon persons who may thereafter purchase from either of the parties, and no transfer made by either after the judgment or decree has been pronounced can prevent the enforcement thereof: *Jackson v. Warren*, 32 Ill. 331; *McCauley v. Rogers*, 104 Ill. 578; *Pittman v. Wakefield*, 90 Ky. 171; *Biddle v. Tomlinson*, 115 Pa. St. 299. It is true there are decisions which we know not how to reconcile with this statement, but they are certainly sustained neither by reason nor by authority: *Rosser v. Bingham*, 17 Ind. 542. When, however, there is no effort to avoid the effect of a final judgment or decree, and the pleadings in the action are relied upon as constructive notice in some other proceedings, doubtless they do not operate as such as against a person who was not a *pendente lite* purchaser: *Coe v. Manseau*, 62 Wis. 81; nor under these circumstances can we see any difference between one who purchases before, and one who purchases after, the entry of the judgment. Though the statute requires a notice of the pendency of an action to be filed, and it is filed accordingly, yet if the notice is canceled, it no longer operates to charge purchasers of property with knowledge of its contents or of

the allegations of the pleadings: *Valentine v. Austin*, 124 N. Y. 400. It is said that the *lis pendens* may cease to operate as notice to third persons when, from some cause, they are deprived of the opportunities of knowledge that ordinarily attend the pendency of a suit, as where the papers in the cause have been removed from the court, and thereby made inaccessible to them: *Arrington v. Arrington*, 114 N. C. 151.

MORTGAGES—LIABILITY OF MORTGAGEE TO ACCOUNT FOR RENTS.—A mortgagee who is not in possession of the mortgaged premises is not accountable for the rents and profits thereof to anyone, but a mortgagee in possession of productive real estate is liable to account for net rents and profits: *Extended note to Caldwell v. Hall*, 4 Am. St. Rep. 70, 71.

EQUITY—PARTIES IN PARI DELICTO.—It is an established general principle that, as between parties in *pari delicto* standing upon an equal footing, no relief will be given. In such a case, the parties will be left in the position where they have knowingly and willfully placed themselves: *Extended note to Harper v. Harper*, 7 Am. St. Rep. 587, 588.

JUDICIAL SALES—ENFORCEMENT OF.—A purchaser under a decree may be compelled to pay the money into court by a summary order, where he has given no bond or security for the purchase money: *Richardson v. Jones*, 8 Gill & J. 163; 22 Am. Dec. 293. Commissioners authorized by a decree of court to sell certain real estate have a right of action in their own names against a purchaser at the sale who fails to comply with the conditions of such sale: *Shinn v. Roberts*, 1 Spenc. 435; 43 Am. Dec. 636.

FIRST NATIONAL BANK v. HUNTINGTON DISTILLING COMPANY.

[41 WEST VIRGINIA, 530.]

PRACTICE IN EQUITY.—Answers and other pleadings, except in cases of injunction, can be filed only at the rules or in court, and not before a commissioner.

THE LIEN OF A JUDGMENT RELATES to the first day of the term at which it was rendered, if it might have been rendered at that date, and takes precedence over other judgments which could not have been rendered until after such day, irrespective of the dates on which such judgments were in fact rendered.

A JUDGMENT IS AS AGAINST OTHER CREDITORS OF THE DEFENDANT, CONCLUSIVE of the justness and the amount of the debt, and cannot, in a bill to enforce the lien against real property, be impeached, except for fraud and collusion.

JUDGMENT AGAINST A CORPORATION INCORRECTLY NAMED IS VALID.—Hence a judgment against the Huntington Distillery Company cannot be treated as void because the true name of the corporation defendant was the Huntington Distilling Company.

A CORPORATION CANNOT TAKE ADVANTAGE OF ITS BEING INCORRECTLY NAMED AS A PARTY DEFENDANT in an action otherwise than by a plea in abatement. Failing to make such plea, a judgment against it cannot be avoided because of a misnomer.

CORPORATIONS—WHO MAY ACCEPT SERVICE OF PROCESS.—A statute requiring the appointment of persons to accept service of process on behalf of the corporation does not become the authority to other officers to make such acceptance, and if process is by law authorized to be served on a president, he may accept service of such process.

Simms & Enslow, for the appellant.

Vinson & Thompson, for the appellee.

531 HOLT, P. On appeal from a decree of the circuit court of Cabell county in favor of the appellee against the Huntington Distilling Company, entered on the tenth day of April, 1895, decreeing certain judgments as liens against the real estate of the Huntington Distilling Company, and a sale of such real estate to satisfy the same, but giving the judgment of the First National Bank of Ceredo priority over the judgment of the Huntington National Bank, from which the latter appeals.

In July, 1894, the First National Bank of Ceredo brought its suit in equity against the Huntington Distilling Company, James A. Hughes, and the Huntington National Bank, alleging that on the twenty-second day of March, 1894, it recovered a judgment against the defendants the Huntington Distilling **532** Company and James A. Hughes for the sum of thirteen hundred and sixty-four dollars and seventy-five cents, and eighteen dollars and seventy-five cents costs, and caused execution to issue thereon, which was duly returned, "No property found," and it files a copy of its judgment, as an exhibit, which it had caused to be entered on the judgment lien docket; alleges that the distilling company is the owner of certain real estate, describing it; and, among other things, prays for a sale thereof to satisfy its lien.

On the thirteenth day of August, 1894, the judge in vacation made an order in the cause referring it to a commissioner, to ascertain, state, and report the real estate—location, quantity, and value—of the distilling company, the number, kind, and amount of the liens thereon, with their order of priority, rental value of the land, etc. The commissioner fixed upon, and published due notice of the twenty-ninth day of September, 1894, at his office, in the city of Huntington, as the time and place of opening his account, which he completed and—having retained it ten days for inspection of the parties—returned and filed the same on the thirty-first day of October, 1894.

While the cause was before the commissioner, the Huntington National Bank brought in and filed with him its answer, and an

answer was also filed before the commissioner purporting to be the answer of the Huntington Distilling Company.

On the nineteenth day of November, 1894, by leave of the court, the plaintiff filed exceptions to the report, on the ground that the commissioner erred in reporting its judgment a nullity, and the judgment of the Huntington National Bank for four hundred and ninety-six dollars and thirty cents as the sole lien. On the tenth day of December, 1894, the Huntington Distilling Company appeared by its president and attorney, and asked leave to file a second answer, and that the one filed before the commissioner be stricken out. The Huntington National Bank objected, and the court took time to consider, and on the tenth day of April, 1895, pronounced the decree appealed from, in which it sustained the motion of the distilling company to strike out ~~the~~ the answer filed with the commissioner, and permitted to be filed the second answer, sustained plaintiff's exception to the commissioner's report, and gave it a decree for its judgment as the first lien in priority, for the judgment of the Huntington National Bank as the second lien, and that the land be sold, etc.

The third assignment of error is that relating to striking out the answer filed before the commissioner and permitting the defendant the distilling company to file what is styled its "second answer." A defendant may put his answer in before the commissioner as a statement brought in of his claim or grounds of defense; but there is no law for filing an answer before a commissioner. Answers and other pleadings, except in cases of injunction, can only be filed at rules or in court: *Zell Guano Co. v. Heatherly*, 38 W. Va. 409.

Supposing, for the present, the plaintiff's judgment to be a valid judgment, did the court err in giving it priority over the judgment of the Huntington National Bank? The judgment of the First National Bank of Ceredo against the Huntington Distilling Company was entered on the twenty-second day of March, 1894, but the suit was on the docket of the March term, 1894, which commenced on the nineteenth day of March. So that it appears the judgment might have been rendered on the first day of the term, and therefore has relation to the first day of the term. But the judgment for the Huntington National Bank was rendered on notice to the twenty-first day of March, 1894, and judgment on the notice could not have been rendered on the first day of the term: *Coutts v. Walker* (1830), 2 Leigh, 268; *Withers v. Carter* (1848), 4 Gratt. 407, 418; 50 Am. Dec. 78;

Brockenbrough v. Brockenbrough (1879), 31 Gratt. 580, 600; Dunn v. Renick, 40 W. Va. 349. This general principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are in a great degree left to conjecture: 1 Black on Judgments, sec. 441, citing Coutts v. Walker, 2 Leigh, 268. See 2 Freeman on Judgments, sec. 369.

The remaining and important question is, Did the plaintiff have a valid judgment? A duly certified copy of the ⁵³⁴ record of the judgment, attested by the clerk of the circuit court of Cabell county, was produced and read in evidence as a part of the plaintiff's bill, and the law makes such attested copy evidence in lieu of the original: See Code 1891, c. 130, sec. 5, p. 821; 2 Freeman on Judgments, sec. 407. And such original imports absolute verity, and, when read, proves itself, and, the judgment being valid on its face, the court determines by inspection the existence of the record and the validity of the judgment. And, as against other creditors, it is conclusive of the justness and amount of the debt, and cannot, on a bill to enforce the lien against real estate, be impeached, except for fraud and collusion: Bensemer v. Fell, 35 W. Va. 15, 25; 29 Am. St. Rep. 774. See McNeel v. Auldridge, 34 W. Va. 748; 12 Am. & Eng. Ency. of Law, 86; Candee v. Lord, 2 N. Y. 269; 51 Am. Dec. 294; Vose v. Morton, 4 Cush. 27; 50 Am. Dec. 750; Garland v. Rives, 4 Rand. 282; 15 Am. Dec. 756. As to voidable writ or judgment, see Ambler v. Leach, 15 W. Va. 677; Cooper v. Reynolds, 10 Wall. 308; 2 Van Fleet on Former Adjudications, 913. These cases and others like them are decisive of these questions. They cannot, in this proceeding, between these parties, and in a collateral way, be raised or taken advantage of. They are settled and concluded by the judgment, and the justness and the amount thereof are set at rest. Perchance the distilling company may have creditors who will suffer if the National Bank of Ceredo recovers a judgment against it, but that gives them no right to interfere with or take part in the litigation: See 2 Van Fleet on Former Adjudications, sec. 515.

But, suppose it was otherwise; what are the defects and the legal consequences thereof, set up by the judgment creditor competing for priority? The writ was against the Huntington Distillery Company; whereas the declaration gave the exact name of this corporation, the Huntington Distilling Company. It is true that corporations are mere legal creatures, and must sue and be sued in their true names: Porter v. Nekervis (1826), 4 Rand. 359;

Culpepper etc. Soc. v. Digges (1828), 6 Rand. 165; 18 Am. Dec. 708. Yet if some words are added to or omitted in the true name of a corporation, this is not a fatal variance, if there be enough to distinguish the corporation from all others, and to show that the corporation ⁵³⁵ suing or being sued was intended: Culpepper etc. Soc. v. Digges, 6 Rand. 165, 167; 18 Am. Dec. 708. It is enough if it be *idem re et sensu*. It need not be *idem syllabis seu verbis*: Mayor etc. of Lyme Regis (1613), 10 Coke, 123 a; Ayray's case, 11 Coke, 18 b. If a corporation be misnamed in a suit against it, it may be pleaded, but only in abatement: 6 Comyns' Digest, 300; 1 Thompson on Corporations, secs. 284, 291. It is true that the name is peculiarly important, as necessary to the very existence of the corporation: 2 Bacon's Abridgment, 440. But, although a corporation be immaterial and intangible in its essential part, it is a mistake to suppose that the exact letters or syllables of the name, or the name as a whole, are the only means of identification. It must have a visible quasi embodiment; must have a local habitation, as well as a name; and when found there, doing business like any unincorporated company of men, the officers of the law and others can lay their hands in many ways and for many purposes upon a tangible thing. Therefore, it is a mistake to suppose it to be a name, and nothing more. And in this case the two names, even, are not only the same in nature and in sense; but, as a means of designation, are they not practically the same in sound? There is no variance in the substance: See Van Fleet on Collateral Attack, sec. 257. Here the summons and declaration, taken together, certainly informed Hughes, the president, that the suit was against his company, and so he swears in effect: See Lafayette Ins. Co. v. French, 18 How. 404, 409. Here the corporation may be to some extent misnamed, but it is correctly described and proceeded against, and its president accepted service of the writ: 1 Thompson on Corporations, sec. 293; 1 Freeman on Judgments, sec. 120 b; 1 Black on Judgments, sec. 213.

But whatever the law may be elsewhere, in this state the question involved in this case is set at rest by the statute. The word "person" includes corporations, if not restricted by the context: Code 1891, c. 13, sec. 17, p. 124, cl. 9. No plea in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on the motion of either party, and on the affidavit of the right name, be amended

by inserting the same therein: Code, c. 125, sec. 14. In other ⁵³⁶ cases, the defendant on whom the process summoning him to answer appears to have been served shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just: Code, c. 125, sec. 15. Service of this writ was accepted by J. A. Hughes, the president of the company. By section 7 of chapter 124 and section 61 of chapter 53, it could be served upon him. Therefore, he could accept service. Section 24 of chapter 54, requiring a corporation by power of attorney to appoint some person residing in the county in this state wherein its business is conducted to accept service on behalf of said corporation, etc., is the dictate of convenience, and manifestly only supplementary. So far as we can see, this is an honest judgment, valid on its face, rendered by the highest court of original general jurisdiction, had on personal service on the president, at its place of creation, residence, and business, and vouched by the record of such court. The policy of the common law has been, time out of mind, to hold such judgments to be binding and stable, and the matters determined not to be set at large again, or the judgment to be liable to overthrow by collateral attack on any ground whatever. There is no attempt to impeach it for fraud, and that cannot be done otherwise than by a direct proceeding brought to set it aside on that ground: *Peninsular Iron Co. v. Eells*, 68 Fed. Rep. 24.

The decree complained of must be affirmed.

JUDGMENTS—LIEN OF—TO WHAT TIME RELATE.—The lien of a judgment relates to the first day of the term at which it was rendered and overreaches intermediate deeds of trust or other encumbrances: *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; contra, *Pope v. Brandon*, 2 Stew. 401; 20 Am. Dec. 49. Judgments have relation back to the first day of the term only in those cases in which the judgment might have been rendered then: *Withers v. Carter*, 4 Gratt. 407; 50 Am. Dec. 78, and note.

JUDGMENTS—CONCLUSIVENESS AS TO OTHER CREDITORS OF DEFENDANT.—A judgment for a debt, is as between the judgment creditor and other creditors, conclusive to establish the relation of debtor and creditor and the justness and amount of the debt, and cannot be attacked except for fraud and collusion: *Bensimer v. Fell*, 85 W. Va. 15; 29 Am. St. Rep. 774; *Candee v. Lord*, 2 N. Y. 269; 51 Am. Dec. 294, and note.

CORPORATIONS—JUDGMENT AGAINST BY WRONG NAME. A mistake in stating the name of a corporation plaintiff in the title in the complaint does not vitiate a judgment, where such name is correctly stated in the body of the complaint, in the original notice.

and in the writ of attachment: *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634; 54 Am. St. Rep. 573. A variance in the name of a corporation by adding or omitting words is not fatal if there be enough to distinguish the corporation: *Culpepper Agricultural etc. Soc. v. Digges*, 6 Rand. 165; 18 Am. Dec. 708, and note.

CORPORATIONS.—PROCESS AGAINST a corporation must be served on its principal officer within the jurisdiction of the sovereignty by whose law it exists, and authority for serving it in any other manner must be conferred by the statute of the state where the process is served: *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32; 41 Am. St. Rep. 831, and note. To bind a corporation, the service of process must be upon the identical agent provided by statute: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204. See, also, the extended note to *Hampson v. Weare*, 66 Am. Dec. 119-122.

KOEN v. BARTLETT.

[41 WEST VIRGINIA, 563.]

LIFE ESTATE, RESERVING IN A CONVEYANCE.—A grantor may, in a conveyance creating a fee, reserve to himself the usufruct of the property for his life.

A **LIFE TENANT** may lawfully mine, sever, and convert the mineral from land into personalty, if the mines were open when the tenancy for life was created.

MINES, WHEN DEEMED TO BE OPENED.—A mine lawfully leased to be opened is an open mine within the reason of the rule permitting a life tenant to mine open mines.

CONVEYANCE—OIL AND GAS MINES, RESERVATION OF RIGHT TO.—If the owner of real property who has executed a lease authorizing another to mine and operate for oil and gas for a term of years and as much longer as the premises may be operated therefor, at a royalty of one-eighth the product, subsequently conveys such premises to his children, subject to such lease, and reserving to himself the full control of the land in all respects and for all purposes during his life, his royalty does not, during his life, pass to the grantees under such conveyance.

Alfred Caldwell and W. P. Hubbard, W. S. Meredith, John Bassell, Raphael and Frank Hayden, for the appellants.

John A. Hutchinson, A. B. Fleming, U. N. Arnett, Jr., and Charles Powell, for the appellees.

563 **HOLT**, P. F. W. Bartlett and H. P. Brand, appellants on appeal from a final decree entered by the circuit court of Marion county on the twenty-sixth day of May, 1894, giving Koen the oil in question, as against Bartlett and Brand, the adverse claimants.

On the nineteenth day of September, 1892, defendant Elijah Kerns was the owner in fee simple and occupant of a tract of land of seventy-five acres situate in Marion county, on Whetstone run, within the productive part of the Mannington oil field, as shown by the event. On that day, he executed to O. S. Nay a lease for

that part north of the county road, to mine and operate for oil and gas for the term of five years, and as much longer as the premises might be operated for oil and gas, at a royalty of one-eighth of the oil delivered in the pipe line. On the fourth day of March, 1893, Nay sold, transferred, and assigned his lease to plaintiff O. N. Koen. By deed dated the 28th of September, 1892, Elijah Kerns had sold and conveyed to O. N. Koen the undivided moiety of the one-sixteenth part of all the oil and gas produced and saved from said land so leased. By deed dated the 30th of September, 1892, O. N. Koen sold and conveyed one undivided two-thirds of his interests conveyed to him by Kerns to Thornton F. Koen and J. T. Koen. Oliver N. Koen, by deed dated October 5, 1893, sold and assigned the Nay oil lease to the South Penn Oil Company, who opened the mine, found oil, and are producing it in large quantities. Elijah Kerns, by six separate deeds, dated December 3, 1892, for natural love and affection, sold and conveyed in severalty, by metes and bounds, to his six several children, in fee simple, in expectancy on the grantor's life estate thereby retained and reserved to himself, the said tract of land leased as aforesaid. Whatever interests these expectant owners of the inheritance had, came by various conveyances to the plaintiffs, O. N. Koen, et al.

These deeds to the children are all alike, and any one will answer our present purpose:

“Elijah Kerns to Emeline Hays. Deed.

“This deed, made this 3d day of December, in the year 1892, between Elijah Kerns, of Marion county, West Virginia, ⁵⁶⁴ grantor, of the first part, and Emeline Hays, of the same county and state, grantee, of the second part, witnesseth: That for and in consideration of the love and affection of the said Elijah Kerns for his said daughter, Emeline Hays, formerly Emeline Kerns, and other valuable considerations, the party of the first part does grant and convey unto the party of the second part the following described real estate, to-wit: A tract or parcel of land lying on Whetstone run, in Mannington district of Marion county, adjoining lands of Rachel A. Jones, M. E. Holbert, C. C. Fox, and Nimrod Hays, and bounded as follows: Beginning at a stone by the road, and, with line of said Rachel A. Jones, S. 84 E., 38 poles, to pointers; thence, with Holbert's, S., 16 W., 36½ poles, to pointers, to C. C. Fox; and with his line, N. 71 W., 33½, to stone; and with the road and Hays' line, N., 50 W., 18 poles, to stone; N. 63 E. 10 poles, to stone; N. 34 E. 16 poles, to the begin-

ning—containing nine (9) acres, more or less, with its appurtenances and privileges. And the party of the first part covenants with the party of the second part that he has good right and title to said property, and that they will warrant generally the same, except that the second party takes the same subject to any lease for oil and gas made by said first party or any sale of royalty for oil or gas made by him and that the said first party retains full control of said land in all respects and for all purposes during his lifetime, and the second party takes said land as her full share of said Elijah Kerns' real estate. Witness the following signature and seal.

his

“ELIJAH X KERNS. [Seal]”
mark

Elijah Kerns, by deed dated the 18th of November, 1893, in consideration of two thousand four hundred dollars, sold, granted, and conveyed by deed of general warranty, to F. W. Bartlett, H. P. Brand, and another the undivided one-sixteenth part of all oil and gas in and under said tract of land of seventy-five acres. This one-sixteenth of the oil which the South Penn Oil Company has produced, and is now producing, and putting in the pipe line, is the matter now in controversy. The plaintiffs, O. N. Koen and others ⁵⁶⁵ claim it by virtue and effect of the deeds from Kerns to his children. F. W. Bartlett and H. P. Brand claim it by virtue of the above deed from Kerns, the life tenant, by reservation. Koen claims it as having passed to the children as owners in fee in expectancy by such deeds. Koen filed his bill to prohibit the pipe line from delivering it or its proceeds to Bartlett. Bartlett answered, setting up his title as the owner. The intermediate court, by decree of the 3d of March, 1894, put it in the hands of a receiver to sell, and hold the proceeds for the one who should be held to be entitled. The intermediate court, by decree of the 26th of May, 1894, held that Bartlett and Brand were not entitled to the said one-sixteenth of said oil in the pipe lines, but that plaintiffs, O. N. Koen and others, were entitled thereto, and decreed accordingly. On appeal to the circuit court by decree of December 4, 1894, the decree of the intermediate court was affirmed, and Bartlett and Brand appealed. The point in dispute turns on the legal effect of the deeds from Kerns to his children.

It is conceded on both sides that Elijah Kerns gave a right to mine for oil and gas; and that the South Penn Oil Company has

produced, and is producing it lawfully, and placing it in the pipe line, as profits produced and issuing from the mines of the freehold, not open in fact until the — day of ———, 1893, after the conveyance to the children. It is conceded on both sides that, by these deeds to his children, Kerns reduced himself to a tenant of a conventional life estate, seised of the present freehold estate in possession, subject to the oil lease; while his children became the owners in fee in expectancy, vested in right of present ownership, but not having the right of present possession and enjoyment: See *Hurst v. Hurst*, 7 W. Va. 289, 339. Whether it is with or without impeachment for waste is, in the view here taken, immaterial. That a fee may well be granted with reservation of the usufruct for life, see *Cribb v. Rogers*, 12 S. C. 564; 32 Am. Rep. 511; *Waugh v. Waugh*, 84 Pa. St. 350; 24 Am. Rep. 191; *Doe v. Grady*, 2 Dev. 395; *Hatch v. Thompson*, 3 Dev. 411; *Hodges v. Spicer*, 79 N. C. 223. Bearing on the question involved, we have, among others, the cases of *Findlay v. Smith* (1818), 6 Munf. 143; 8 Am. Dec. 733; *Crouch v. Puryear* (1822), 1 Rand. 258; 10 Am. Dec. 528; *Macauley v. Dismal Swamp Land Co.* (1843), 2 Rob. (Va.) 507, 525; *Williamson v. Jones* (1894), 39 W. Va. 231. Upon the strength of these cases, it is conceded by both parties that mines of oil and gas in place are land, and, as such, go with the inheritance; and it must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold in his possession, which possession extends from top to bottom, to the subsurface as much as to the surface—in other words, to the land as a whole—for the tenant for life has a freehold, as well as a tenant in fee: *Coke on Littleton*, 43 b; 4 *Comyns' Digest*, 62; and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his subsuperficial close, than they have to break and enter his close on the surface. Their estate of inheritance is vested in right of interest, but not in right of enjoyment. Their estate is expectant on the determination of the life estate. It is the duty of the life tenant to spare and preserve the corpus of the inheritance, and of the owners of the fee in expectancy to wait, for they have no present right of use and enjoyment, and cannot exercise any right by anticipation; and their respective duties point out their respective rights. It is further conceded, on the strength of these cases and of the books generally, that if these mines of oil and gas had been open when Kerns, by cutting down his fee, came in as tenant for life of the immediate freehold, then he

would have a right to work them during the continuance of his estate, and take the issues and profits thence produced; for these two are derivative parts of one estate; each, in quantity of ownership and order of enjoyment, is measured and determined by time; and though both are vested in right, the life tenant has the hither segment—the immediate freehold—and therefore the sole right to hold, use, and enjoy. And, if the mine is “open” when he comes in, then we conclude that the one who had the right to say has, by his actions, which speak louder than words, manifested his intention that it may be worked. Hence the life tenant may lawfully mine, sever, and convert the mineral from land into personalty; and this is something in which the owner of the expectant estate of ⁵⁶⁷ inheritance has no right. He has a vested right in it as land—nothing more—and if the severance is unlawful, may sue at law, enjoin in equity, and have an account: *University v. Tucker*, 31 W. Va. 621. But when, by lawful severance, it ceases to be land, his right ceases, and the owner of the immediate freehold takes the issues and profits; for, under the law, he has a right to the full enjoyment and use of the land and all its profits during his estate therein: 2 Blackstone’s Commentaries, 122; *Williams v. Pearson* (1862), 38 Ala. 299, 309; *Crouch v. Puryear*, 1 Rand. 258; 10 Am. Dec. 528; 1 Coke’s Institutes, 54 b; *Williams on Real Property*, 17th ed., 127; *Crabb on Real Property*, sec. 100; *Tiedeman on Real Property*, secs. 2, 75; *Kerr on Real Property*, sec. 682; *Jackson v. Van Hoesen*, 1 Shars. & B. Lead. Cas. Real Prop. 191, 206; *McSwinney on Mines*, 46, 47; 2 Minor’s Institutes, 602; *Eley’s Appeal* (1883), 103 Pa. St. 307. The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion; and it is settled law that the rents of an open mine are income and go to the tenant for life: *Rankin’s Appeal*, 1 Pa. Sup. Ct. Cas. 308. Lawfulness of severance and conversion into personalty seem to be the reason of the doctrine of the life tenant’s right to the rents and profits produced from open mines. A mine lawfully leased to be opened is an “open mine,” within the reason of the rule as laid down in these cases; and when lawfully opened and worked, as in this case, during the time that the freehold estate of the life tenant continues, the profits issuing therefrom, thus lawfully severed and produced, belong of right to him; for the term “profit,” in law, comprehends the produce of the soil, whether it arise above

or below the surface, including product of mines, as well as the herbage growing on the surface.

In the latter part of the clause of general warranty, the grantor, Elijah Kerns, in the deeds to his children, makes an exception requiring the grantee to take subject to the lease for oil and gas and his sale of royalty; and it is said that inasmuch as the grantor stops there, not excepting the unsold part of the royalty, therefore he meant it to go with the estate in fee in expectancy, granted to his children. But the answer is, that was the place to except what he had parted ⁵⁶⁸ with, and what he reserved and retained found its proper place in the clause of reservation, retaining a life estate, and this oil lawfully severed as an incident thereof.

This, in my view, decides the case in favor of Bartlett and Brand, and requires the two decrees they complain of to be reversed, for they are the grantees of the life tenant, and as to the one-sixteenth of the oil have succeeded by purchase to his rights.

LIFE ESTATE—RESERVING IN CONVEYANCE.—A deed conveying an estate in fee to the grantee, with a reservation of a life estate to the grantor, is good as a covenant to stand seized: *Jackson v. Staats*, 11 Johns. 337; 6 Am. Dec. 376; *Brewer v. Hardy*, 22 Pick. 376; 33 Am. Dec. 747. A reservation in a warranty deed of all the grantor's right, title, and interest for his life is valid: *Graves v. Atwood*, 52 Conn. 512; 52 Am. Rep. 610. A deed of land to A, her heirs and assigns forever in consideration of love, goodwill, and affection, reserving the use of the lands during the grantor's natural life, conveys the fee in praesenti, subject to the life estate: *Cribb v. Rogers*, 12 S. C. 564; 32 Am. Rep. 511.

LIFE TENANT—RIGHT TO MINE.—A tenant for life is entitled to work quarries or mines already opened on the land before the commencement of his life estate: *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721. See, also, the extended note to *McClintock v. Bryden*, 63 Am. Dec. 101.

GOFF v. MILLER.

[41 WEST VIRGINIA, 633.]

NON-NEGOTIABLE INSTRUMENT.—ONE WHO DEALS IN non-negotiable property acquires it subject to all equities in the maker and the right of recourse against remote assignors, subject to their equities, whether he knows thereof or not.

NON-NEGOTIABLE INSTRUMENTS, MEASURE OF DAMAGES, RECOVERABLE AGAINST ASSIGNOR.—An assignor of a non-negotiable instrument which proves worthless is not liable to any assignee thereof beyond the consideration actually received by the defendant for his assignment. Hence, in an action by an assignee against a remote assignor, the complaint must allege a consideration for the assignment made by the defendant.

PRACTICE—WAIVER.—A motion to exclude the plaintiff's evidence is waived by the defendant's proceeding to trial and producing evidence in his own behalf.

Schilling & Starkey, for the plaintiff in error.

J. W. C. Armstrong, for the defendant in error.

⁶⁸³ DENT, J. Writ of error to the judgment of the circuit court of Roane county, rendered on the fifth day of April, 1894, in favor of H. F. Goff, plaintiff, against John C. Miller, defendant, for the sum of one hundred and eighteen dollars and sixty-two cents, with interest and costs.

The facts are as follows, to wit: The defendant agreed to give his brother, Joseph Miller, a small tract of land, who gave the same to one Thomas J. Woods, and he erected a small building thereon for a shoemaker shop. Woods sold this property to Christopher Bilby for one hundred dollars, and had him execute his note payable to the defendant, in whom the legal title to the property still remained. He then had the defendant assign the note to him, paying no consideration therefor, but simply to show that defendant was to make the deed for the property. Woods then assigned the note to J. P. Short, who assigned it to plaintiff. ⁶⁸⁴ Plaintiff assigned it to J. G. Schilling. Schilling, not being able to make it off of Bilby because of his insolvency, resorted to it on the plaintiff.

Plaintiff thereupon instituted this suit to recover the amount paid by him from the defendant, and obtain the judgment aforesaid. Plaintiff further testified: "That some two or three months after he got the note of J. C. Short he saw the defendant at the mill, where he [said Goff] was around assessing, and that he told said defendant that he had the Bilby note, which was assigned by him, said defendant; that he [Goff] did not know much about Woods or Bilby, and that Short was not good; that he had traded for the note because the defendant's name was on it, and that he knew the defendant was good, and that defendant said he was not very good, that Bilby had property, and he expected Bilby to pay it, and that he [Goff] said he had traded for it because defendant's name was on it; that defendant did not claim to him that he was not to be responsible for said note, and that he [the plaintiff] had no notice of any contract between said Woods and said defendant; that the plaintiff had no notice that the defendant was not to be liable on said note, and the plaintiff had no notice that no consideration passed from said Woods to the defendant for his assignment of said note." The note was non-negotiable.

Defendant assigns the following errors, to wit: 1. The complaint in said action is faulty because it does not aver a consideration for the assignment from the petitioner to T. J. Woods: 4

Robinson's Practice, 422. Without such averment of consideration the complaint did not show any cause of action against the petitioner. 2. The court erred in refusing to exclude the plaintiff's evidence when he had rested, there being no evidence of any consideration for the assignment from the petitioner to said Woods. 3. It was error not to set aside the verdict of the jury, because the evidence clearly showed that there was no consideration from T. J. Woods to the petitioner for his assignment of the note, and the evidence also clearly showed that, by the agreement between T. J. Woods and the petitioner, there was to be no liability on the petitioner because ⁶⁸⁵ of his assigning the note; and by the code, chapter 99, section 15, the petitioner was entitled to the benefit of the same defense against the plaintiff as he would have had against said T. J. Woods, and therefore the said verdict of the jury was without any evidence, and was contrary to the evidence in the case.

It is the settled law that a person who deals in non-negotiable paper acquires it subject to all equities in the maker and the right of recourse as against remote assignors, subject to the equities of such assignors. Nor is such person entitled to notice of such equities, but he deals in such paper at his peril. The law governing this case is plainly stated in 1 Tucker's Commentaries, 336, 337, as follows, to wit: "In an action brought by an assignee against his assignor he is entitled to recover, not on the ground of the assignment, for the transferrer of the bond is equally liable by the sale of the bond, even without assignment, but on the principle of natural justice that if a man buys of another that which afterward turns out to have been worthless, he is bound to refund the price. The consideration having failed, he must pay back the money. Hence the assignor is never liable for more than the price the assignee gave for the bond, with interest, and the costs sustained in prosecuting the obligor. Hence, too, the assignee who sues the remote assignor can recover from him only so much as he has received from his immediate assignee": *Mackie v. Davis*, 2 Wash. (Va.) 219; 1 Am. Dec. 482; *Whitworth v. Adams*, 5 Rand. 377; *Drane v. Scholfield*, 6 Leigh, 397; *Thomas v. Linn*, 40 W. Va. 122.

The plaintiff is only entitled to recover from the defendant the consideration received by him from his immediate assignee, Woods, and therefore it was necessary for him to allege in his complaint the consideration for the assignment, and, failing to do so, the court should have rejected such complaint as insufficient:

Hall v. Smith, 3 Munf. 550. The gist of the action was the consideration which passed from Woods to the defendant, and the burden of alleging such consideration was not only on the plaintiff, but also the burden of proving it. Without such proof he was not entitled to recover. The motion to exclude the plaintiff's⁶⁸⁶ evidence, being the ground of the second assignment of error, was waived by the defendant proceeding with the trial, and introducing his own evidence after the motion was overruled: Core v. Ohio River R. R. Co., 38 W. Va. 456.

The verdict of the jury being contrary to the law, as above stated, and without allegation or evidence to support it, the judgment is reversed, the verdict set aside, and the case is remanded, with direction to the circuit court to sustain the motion to reject the plaintiff's complaint unless properly amended, and for further proceedings according to law.

NON-NEGOTIABLE INSTRUMENTS—RIGHTS OF THE PARTIES.—A transferee of a non-negotiable note is not bound to inquire of the maker whether any defenses exist against it, and, failing to do so, he stands exactly in the shoes of the person from whom he receives it: Janes v. Benson, 155 Pa. St. 489; 35 Am. St. Rep. 899, and note. See, to the same effect, Merchants' etc. Sav. Bank v. Frazee, 9 Ind. App. 161; 53 Am. St. Rep. 341.

HISSAM v. PARRISH.

[41 WEST VIRGINIA, 686.]

SPECIFIC PERFORMANCE—MUTUALITY, WANT OF — OPTIONS.—A contract giving a person an option to sell shares of stock to another at a price specified, but not requiring him to make such sale, has no mutuality, and therefore will not be enforced in equity.

SPECIFIC PERFORMANCE—ADEQUATE REMEDY AT LAW.—A contract to buy a specified number of shares of the capital stock of a corporation at a price designated will not be specifically enforced in equity at the suit of the vendor. His remedy at law is adequate.

SPECIFIC PERFORMANCE—VARIANCE.—If the contract proved differs from that pleaded, specific performance will be denied.

Campbell & Holt and E. S. Doolittle, for the appellants.

Wyatt & Hutchinson and Northcott & Perry, for the appellee.

⁶⁸⁷ **ENGLISH, J.** This was a suit in equity brought by D. F. Hissam, in the circuit court of Cabell county, against M. F. Parrish, S. J. Kane, S. W. Neville, and A. H. Nagle, on the twenty-

third day of May, 1893, praying that the defendants, and each of them, be required to specifically perform a contract bearing date the twenty-eighth day of September, 1891, a copy of which is exhibited with the plaintiff's bill, and which agreement purports to have been made between D. F. Hissam, of the first part, and the Milton Manufacturing Company, of the second part, but which agreement appears to have been signed and sealed by D. F. Hissam, M. F. Parrish, S. J. Kane, S. W. Neville, and A. H. Nagle.

The plaintiff's bill alleges that the defendants and one W. J. Miller formed themselves into a company, known as the "Milton Manufacturing Company," for the purpose of buying and selling timber, cutting saw logs, planing and dressing lumber, and for the manufacturing of doors, sash, frame, etc., and that the same was incorporated under the laws of the state of West Virginia, in the name and was known as the Milton Manufacturing Company, as above set out; that the stock of said company was composed of ——— shares of stock, at one hundred dollars per share; that before the creation of said corporation and the formation of the aforesaid company, the said defendants, and each of them, for the purpose of creating said corporation and formation of said company as aforesaid, and inducing complainant to take stock in said company to the amount of eight shares, of one hundred dollars per share, entered into a written contract with complainant, signed by him and ^{and} each of the said defendants, and sealed with their seals (a copy of which contract is filed as part of complainant's bill); that by the terms of said contract, the complainant was appointed and constituted book-keeper and general manager of the said company, for the period of one year from the beginning of the operation of the business of the said company; that complainant did act as such book-keeper and general manager of said company for the period of one year from the beginning of the said partnership business as aforesaid. Complainant also alleged that, by the terms of said contract, the said defendants, and each of them, bound themselves, their heirs and assigns, to buy the stock of complainant, and pay him therefor at the rate of one hundred dollars per share; that at the expiration of the said one year, he did offer and tender his said eight shares of stock to said defendants, and each of them, together with the certificate thereof, and still offers said shares of stock to said defendants, and did at, before, and since the expiration of said one year, notify said defendants, and each of them, that he expected

to dispose of said stock to the said defendants, and for the said defendants to purchase the same, as by their contract they were bound to do; that at the expiration of the first year, the said company then had a good business and considerable valuable property, out of which his said shares of stock could have been paid for, at the rate of one hundred dollars per share, without taking more of the funds and stock in said company than his said eight shares of stock would bear to the whole stock of the said company; that the said defendants, and each of them, have the whole amount of the said stock in their possession and control, and are now receiving the rents, issues, and profits of the same, and have so received the rents, issues, and profits of the same for considerable time, and, by reason thereof, have received large dividends from the said company, and that there has been no division of said funds with complainant; and he prays that the said defendants, and each of them, be required to perform and comply with the terms of the said contract.

The contract, a copy of which is exhibited with the bill, reads as follows:

Exhibit No. 1.

"Article of agreement ^{CSO} made this 28th day of September, 1891, between D. F. Hissam, party of the first part, and the Milton Manufacturing Company, party of the second part, witnesseth: That the said party of the first part hereby covenants and agrees that he will act as book-keeper and manager of the said Milton Manufacturing Company, to the best of his ability, for the term of one year from the date aforesaid; that the party of the second part hereby covenants and agrees to appoint the said D. F. Hissam as book-keeper of the said Milton Manufacturing Company for the term of one year from the date aforesaid, and to pay him for his services faithfully performed a salary not less than thirty-five (\$35) dollars per month. The said party of the second part further covenants and agrees that at the expiration of one year from the date aforesaid, and at the option of the said party of the first part, to purchase all of the stock of the said Milton Manufacturing Company subscribed for by said party of the first part, and to pay him for the same at the rate of one hundred dollars per share. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the parties

of these presents have hereunto set their hands and seals, the day and year first above written.

"D. F. HISSAM. [Seal]

"M. F. PARRISH [Seal]

"S. J. KANE. [Seal]

"S. W. NEVILLE. [Seal]

"A. H. NAGLE. [Seal]"

The defendants demurred to the plaintiff's bill, which demurrer, on consideration, was overruled. The appellants filed their answers. Depositions were taken and filed, and on the 21st of December, 1893, the cause was heard upon the whole record, and the court decreed that the plaintiff was entitled to the relief prayed for, and directed that the defendants should specifically perform said contract.

The first error relied on by the appellants is as to the action of the court in overruling their demurrer to the plaintiff's bill, and requiring them to answer. In discussing the questions raised by this demurrer, the question which first presents itself is, whether the contract, which is made a part of the bill, is such as calls for specific enforcement in a court ⁰⁹⁰ of equity. It will be perceived that the bill is silent in its allegations as to the sale of the eight shares of stock being optional by the terms of the contract, so far as the plaintiff is concerned. If the stock advanced in value, and was worth a premium at the end of the year, so that the defendants might derive a profit by the purchase of the stock, they would have been entirely without remedy, in a court of equity or otherwise, to enforce a sale and delivery of the stock by the plaintiff; and yet, the stock having become depressed and worthless, he asserts his claim to have the contract specifically enforced. This of itself appears to show an utter want of mutuality. Fry on Specific Performance, section 286, page 198, upon this question, states the law thus: "A contract, to be specifically enforced by the court, must be mutual; that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." In note 1 it is said: "No rule in equity is more thoroughly settled than this": Citing *Benedict v. Lynch*, 1 Johns. Ch. 370; 7 Am. Dec. 484, and numerous other authorities, and

stating, further, that "a party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party by expressing his willingness in his bill to perform his part of the engagement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character": Citing *Duvall v. Myers*, 2 Md. Ch. 401, and *Bodine v. Glading*, 21 Pa. St. 50; 59 Am. Dec. 749. In the case of *Burke v. Parke*, 5 W. Va. 122, this court held that a court of equity will not entertain jurisdiction for the specific performance of an agreement respecting goods, chattels, stock, choses in action, and other things of a merely personal nature, where compensation in damages furnishes a complete and satisfactory remedy: See 2 Story on Equity Jurisprudence, sec. 718. See, ⁶⁹¹ also, Pomeroy's Equity Jurisprudence, section 1401, where the law is thus stated: "The remedy of the specific performance of contract is purely equitable, given as a substitute for the legal remedy of compensation whenever the legal remedy is inadequate or impracticable. In the language of Lord Selborne: 'The principle which is material to be considered is, that the court gives specific performance, instead of damages, only when it can by that means do more perfect and complete justice.'"

Is there anything in the case under consideration which would, in accordance with these principles, give jurisdiction to a court of equity? The entire demand asserted by the bill is for the payment by the defendants for eight shares of the stock of the Milton Manufacturing Company; and we can see nothing which would prevent the collection of the amount in an action of covenant or assumpsit if the plaintiff could show himself entitled to recover the amount. Again, Pomeroy, in speaking of the essential elements and incidents which entitle a party to specific performance, states the law as follows, in section 1405, volume 3, of his Equity Jurisprudence: "Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others, its equitable character. It must be upon a valuable consideration. It must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be, in general, mutual in its obligations and its remedy." Can we say that the

contract we are considering meets with these requirements? We have attempted to show its want of mutuality, for the reason that a sale of the stock was optional with the plaintiff, and for that reason could not be enforced against him. Was there any consideration moving from the plaintiff for the promise on the part of the defendants to purchase his stock at one hundred dollars per share? It is true that the plaintiff alleges in his bill that, before the creation of said corporation and the formation of said company, the defendants, for the purpose of creating ~~and~~ said corporation and inducing him to take stock in said company to the amount of eight shares, of one hundred dollars per share, entered into the contract which is sought to be specifically enforced; but there is nothing of that kind appearing in the contract, which is made part of the bill, and we must look to the contract for its terms and parties, and, so far from being made before the corporation was formed, on the face of the contract the "Milton Manufacturing Company" appears to be made party of the second part, although it is signed by the defendants, and for this reason said contract cannot be considered reasonably certain as to its parties, and for these reasons my conclusion is, that the court erred in overruling the demurrer.

But, if there should be any doubt upon that proposition, the bill should have been dismissed at the hearing, for the reason that the contract proved is not the contract alleged. In the bill the plaintiff charges that, for the purpose of creating said corporation, and forming said company, and inducing him to take eight shares of stock at one hundred dollars per share, the defendants entered into a written contract with him, agreeing to appoint him book-keeper and general manager of said company, for the period of one year from the beginning of the operation of the business, and bound themselves to purchase the stock of plaintiff, and pay him therefor at the rate of one hundred dollars per share. The bill, however, omits to state that the purchase by the defendants of his stock at that price was to be at plaintiff's option, which appears on the face of the contract. And the plaintiff, in giving his testimony in the case, when asked, "What consideration did you pay the defendants for executing to you the contract sued upon?" answered, "None"; and in reply to the question, "Was it not understood between you and them that you were to work one year for the company as book-keeper and manager thereof, in consideration of their agreeing at the expiration of said year to buy the eight shares subscribed for by

you?" he says: "I do not consider that that was the consideration for which I was to work. I was to receive thirty-five dollars per month for my work." And, further on in his testimony, he states he was working for the company ⁶⁹³ and not for the defendants, and was paid for his work by the company. The portion, then, of the contract which the court was asked to specifically perform is that in reference to the purchase of the plaintiff's eight shares of stock; but in that portion of the contract, as we have attempted to show, there is no mutuality and no consideration, and for the further reason that, in my opinion, the plaintiff had a plain, complete, and adequate remedy at law, the bill should have been dismissed; and the case should have taken this course for the further reason that the contract proved is not the contract charged in the bill, the rule in this regard being the same in regard to personalty as it is to realty: See the case of Patrick v. Horton, 3 W. Va. 23, where it is held that "to enable a court to enforce a specific contract for the sale of real estate, the contract must be established by competent proof to be clear, definite, and unequivocal in all its terms, and the contract proved must be that charged in the bill."

In the light of these authorities, and for the foregoing reasons, the decree complained of must be reversed, and the bill dismissed, with costs to the appellants, but without prejudice as to such proceedings at law as the appellee may be advised to take.

SPECIFIC PERFORMANCE—MUTUALITY.—Contracts, in order to be enforced by specific performance, must be mutual in obligation as well as in remedy: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758, and note. Where the remedy is not mutual, or where only one party is bound, a bill for specific performance of an agreement will not be sustained: *Benedict v. Lynch*, 1 Johns. Ch. 370; 7 Am. Dec. 484, and extended note; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 186; *Bodine v. Glad- ing*, 21 Pa. St. 50; 59 Am. Dec. 749, and note. See, especially, the note to *Grimmer v. Carlton*, 27 Am. St. Rep. 173, and *South etc. R. R. Co. v. Highland Avenue etc. R. R. Co.*, 89 Am. St. Rep. 82.

SPECIFIC PERFORMANCE—INADEQUACY OF REMEDY AT LAW.—Specific performance of a contract respecting personal property will not ordinarily be enforced in equity, unless an adequate remedy at law cannot be had: *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404. See a further discussion of this subject in the extended note to *Anderson v. Green*, 28 Am. Dec. 422.

KIRK v. NORFOLK AND WESTERN RAILROAD COMPANY.

[41 WEST VIRGINIA, 722.]

RAILWAYS, LIABILITY FOR USE OF SALT ON A TRACK WHEREBY DOMESTIC ANIMALS ARE ATTRACTED AND KILLED.—The use of salt in thawing out switches, and thus preventing the accumulation of ice from throwing trains from the track, though it attracts cattle thereto and results in their being killed by passing trains, is not negligence on the part of a railway corporation, and does not subject it to liability for the cattle so destroyed, if it appears that such use of the salt was a necessity to protect the lives of passengers and others who travel on railway trains, and a failure to use it would, in the case of an accident caused by such failure, be regarded as an act of negligence.

RAILWAYS—CATTLE KILLED, LIABILITY FOR VALUE OF THEIR CARCASSES.—If cattle are killed by a railway train under such circumstances that the corporation cannot be adjudged guilty of negligence and held liable for such killing, their carcasses, nevertheless, remain the property of their owners, and if the corporation has, by its agents, refused to permit such owners to take possession thereof and remove the same, it is liable for the value of the animals in the condition in which they were when the owners' right to remove their remains was thus denied.

Campbell & Holt, for the plaintiff in error.

J. B. Wilkinson, for the defendant in error.

722 ENGLISH, J. This was a civil action brought by G. W. Kirk, against the Norfolk & Western Railroad Company, before T. J. Mead, a justice of the peace of Logan county, for a wrong **723** alleged to have been committed by the defendant, in which damages to the amount of three hundred dollars were claimed.

In the complaint filed before the justice, the plaintiff alleged that between the first day of October, 1892, and the first day of March, 1893, the defendant killed three oxen, and crippled another one, which belonged to the plaintiff, of the value of forty-five dollars each for two that were killed and sixty-five dollars for the other, and twenty-five dollars for the one that was crippled.

On the seventeenth day of June, 1893, the case was heard, and judgment rendered for the plaintiff for one hundred and sixty dollars, with interest till paid and costs. An appeal was taken to the circuit court. An amended complaint was filed. The plea of not guilty was interposed. Issue was joined. A jury was waived, and the matters of law and fact were submitted to the court, and resulted in a finding for the plaintiff, and assessing his damages at one hundred and twenty-five dollars. The defendant moved the court to set aside its finding, as contrary to the law and the evidence, and grant it a new trial, which motion the court overruled, and entered judgment for the plaintiff. The

defendant excepted, and took a bill of exceptions, setting forth the evidence introduced upon the trial of said cause, and thereupon the defendant applied for and obtained this writ of error.

Now, the injuries complained of occurred at different times. The evidence shows that about the fifteenth day of December, 1892, the plaintiff found one of his work oxen had been killed, about one hundred yards below the Vinson switch, on the Norfolk & Western Railroad, in Logan county, West Virginia. The steer was badly bruised up, and some of its limbs broken, and it was lying by the side of the railroad track. He did not see it killed. It was worth forty dollars. This was all the evidence adduced in regard to the killing of this steer. The testimony is entirely silent as to the circumstances under which it was killed. So far as appears, it may have been killed in the night, when it could not have been seen. It may have come suddenly onto the railroad track, and no negligence could properly ⁷²⁴ have been imputed to the defendant; and the burden of proving negligence rests upon the plaintiff, so that, as to this steer, the court surely would not be warranted in assessing any damages against the defendant. Another one of the plaintiff's steers was found dead by plaintiff lying near the railroad track, about two weeks after the first one was killed, at the Breeden switch, in said county, on the line of said railroad. This steer had both of its hind legs broken, and was lying on the switch. He identified the steer, but knew nothing of the circumstances attending the killing. A witness, however, by the name of Ferguson, who resides near the Breeden switch, states that some time in January, 1893, he saw an ox which belonged to the plaintiff struck by a train near said switch, that he heard the train coming down the creek, and looked out of the window of his house, and saw some cattle standing near the track; that one of the plaintiff's steers was struck, and thrown off of the main track onto the switch. It was badly crippled but not killed, and shortly afterward it was buried by the railroad hands working on that section. This train whistled just before or just about the time it came in sight, and was running fast. He heard but the one whistle, which sounded like it was for a whistle post. If any other alarm was given before the steer was struck, he did not hear it. He was about fifty feet from the track where the steer was struck. That stock could have been seen about one hundred and seventy-five or two hundred yards from the direction of the approaching train. It was a passenger train, and did not appear to slacken its speed either before or after striking the

steer. This occurred in the evening. Now, it will be perceived that the cattle, when seen by the witness Ferguson, were not on the track, but were standing near it. He was only fifty feet away, and could see the position of the cattle. At what time this steer came onto the track, so as to be in the way of the train, does not appear. He may have been alarmed by the whistle or the noise of the approaching train, and have attempted to cross the track. At any rate, he went onto it, and his hind legs being broken would indicate that he was moving along the track in front of the train, or attempting ⁷²⁵ to leave it. How near the train was when this occurred does not appear, but it must have been very near, as it was a passenger train, and was approaching rapidly, while the ox was changing his position from near the track onto the track itself. From this testimony, we may readily infer that when the cattle were first seen by the trainmen, they were near the track, but not on it, as Ferguson so places them when he heard the whistle of the rapidly approaching train. The cattle could have been seen, say, for two hundred yards; Ferguson says, from one hundred and seventy-five to two hundred. A train running at the rate of twenty-five miles an hour would run two hundred yards in about fifteen seconds, which would allow the steer but a quarter of a minute to change his position after the train came in sight; and, as the engineer states, the train could not have been stopped if he had had the entire two hundred yards in which to stop after the steer came on the track, but, so far as appears, he must have stepped on the track immediately in front of the train, and no amount of diligence on the part of those in charge of the train could have prevented the collision or the death of the steer. Under these circumstances, we think the court erred in finding against the defendant the value of this steer.

About the 15th of January, 1893, the plaintiff had another steer killed, and a fourth one crippled, at or near Vinson switch, in said county. He did not see it done. The one killed was found lying near the track, and the crippled one was also found near the railroad track. The one killed was worth forty dollars, and the damage done the crippled one was at least twenty-five dollars. The only testimony in regard to the circumstances of this last occurrence is that detailed by one William Kirk, who states that he was working near said Vinson switch, hauling saw-logs; that a short time before the killing of this last steer and crippling another at said switch, about the fifteenth day of Janu-

ary, 1893, some salt had been used at said switch, and it attracted the cattle which were being used there to haul sawlogs; that the railroad at that point, and for some distance above and below, was not inclosed in any way, there being no station or depot, only a switch to receive sawlogs ⁷²⁶ on the cars; that, on that evening, he noticed the cattle at the switch, licking where the salt had been used, and he drove them away, fearing a train would come along and kill some of them. After driving them away, he returned to his log shanty, on the opposite side of the creek. A few moments afterward he heard a train coming down the creek, and stepped out of his shanty, and saw the engine run in among the cattle, which had returned, and were again licking salt at the switch. He went across to the railroad track, and found one ox killed and one crippled, both of which belonged to plaintiff. He describes the injuries received by the cattle, and says they were both found near the switch, and were part of the cattle which he had a short time before driven away from the switch. This was at or near dusk. The train consisted of a locomotive, baggage-car, and two passenger coaches, and was running about twenty-five miles an hour, and, after striking the cattle, kept on at the same rate without stopping. Stock could have been seen a distance of about two hundred or three hundred yards on the track from the direction in which said train was approaching. If any alarm was sounded by either bell or whistle, he did not hear it. Now, it will be perceived that there is no evidence that these cattle were on the track at the time this train came in sight of the switch. They had been driven away by the witness Kirk a few minutes before, but when they returned he does not know, and does not state. He states that he saw the engine run in among the cattle when he stepped out of his shanty, but when they returned he does not know or say. So far as the evidence shows, the cattle may have gone on the track immediately in front of the approaching train. If they had been on the track sooner, it must be presumed that self-preservation, if nothing else, would have prompted the trainmen to do their duty by sounding the alarm; and the fact that no alarm was sounded strongly indicates that nothing was seen on the track; and it is incumbent on the plaintiff to show that the cattle were on the track, and were killed and crippled by the negligence of the defendant.

It is contended by counsel for the defendant in error that the use of salt in thawing out the switches, and thus preventing ⁷²⁷ the accumulation of ice from throwing the train from the track

or creating such a liability, which had the effect of attracting cattle to the switch, was negligence on the part of the plaintiff in error, and he cites *Brown v. Hannibal etc. R. R. Co.*, 27 Mo. App. 394, and *Morrow v. Hannibal etc. R. R. Co.*, 29 Mo. App. 432, in support of his contention. An examination of said authorities, however, shows a very different state of facts. In the first-named case, the railroad company allowed quantities of salt to be piled on and near its track, and to remain there after it knew the salt was there, by reason of which a horse was attracted to it, and killed. In the second case, several merchants had a refrigerator near the railroad track, and the brine running from said refrigerator caused the ground near the railroad to be saturated with brine, which attracted a cow to the track, which was killed. It was shown that the railroad had notice, and had neglected to take any steps to correct it, and this was held to be negligence on the part of the railroad, and that it was liable. It is, however, shown in the case under consideration, that the use of salt at switches is an absolute necessity to protect the lives of passengers and others that travel on railroad trains, and not to use it would, in case of accident caused by such failure, be regarded as an act of negligence. In the case of *Blaine v. Chesapeake etc. R. R. Co.*, 9 W. Va. 252 (point 5 of syllabus) this court held: "There is no law in this state of general operation requiring any person to fence his land uninclosed; but the person who leaves his land uninclosed takes the risk of intrusion thereon by domestic animals of others running at large, and the owner of such animals, in allowing them to run at large, takes the risk of their loss, or of injury to them by unavoidable accident, from any danger into which they may happen to wander." And in point 12 the law is thus stated: "Where a railroad company leaves its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railway track, it is the duty of the railway company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals when found in the way of a train on the road. The first and paramount ⁷²⁸ duty of the agents of the company is a due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care; and so far as consistent with this paramount duty, they are bound to the exercise of what, in that peculiar business, would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon this uninclosed road; and

if the servants of the railroad company in charge of a train can, by exercise of ordinary care, see and save domestic animals which have wandered on the railroad, it is their duty to do so; and for any injury to animals arising from a neglect of such care the company is liable in damages to the owner": See, also, *Baylor v. Baltimore etc. R. R. Co.*, 9 W. Va. 271, where this court held it to be the duty of the servants of the railroad company, so far as consistent with their other and paramount duties, to use ordinary care to avoid injuring cattle on the track. They are bound to adopt the ordinary precautions to discover danger, as well as avoid its consequences after it becomes known. And, applying these principles to the facts and circumstances of this case, we conclude that the court erred in fixing any liability upon the defendant by reason of imputed negligence on its part.

On appeal, however, to the circuit court, the plaintiff filed an amended complaint, in which he alleged that the defendant, on the last day of January, 1893, unlawfully killed and appropriated to its own use three oxen of the plaintiff of great value, to wit, of the value of one hundred and twenty-five dollars; and the testimony shows that one of said oxen was lying on the Breeden switch, with both of its hind legs broken; and, as it was in good order, the plaintiff proposed to take charge of it, and use it for beef, but the section foreman refused to let him have it, and the steer was buried by said foreman, and workmen under his control. The witness also states that this steer was worth sixty dollars; but as we cannot say whether this valuation applied to the steer in its crippled or mutilated condition, to the value of its carcass for beef, or to the steer as it stood on the railroad when struck by the train, we are of opinion that the circuit court had before it no data by ⁷²⁹ which to determine the value of said steer; and, while we are of opinion that the plaintiff was entitled to something for the dead carcass of the steer demanded by him, and refused by the section boss, we cannot determine the amount, and the court below was not warranted on the evidence in fixing any amount.

For these reasons, the judgment complained of must be reversed, the finding set aside, and the case remanded.

BRANNON, J. We hold the company not responsible for killing or crippling the cattle, but we think it responsible for not yielding to the owner one of the cattle after it was killed, and demanded by the owner, and, as the complaint called for damages for its conversion, the plaintiff ought to have

judgment for that much for its conversion. But no evidence showed its value when dead, and therefore only nominal damages could be given for it. As we do not know how much to subtract for that steer from the amount of damages found against the company, and could only subtract nominal damages, we cannot say the amount of grievance to the company is reduced below the jurisdictional amount of one hundred dollars.

JUDGE DENT DISSENTED, holding that, conceding the necessity for the use of salt in the manner employed by the defendant for the purpose of promoting the safety of its passengers, its duty was "to provide against the danger thereof, by providing, by necessary fencing or watchmen, to keep stock away from it, not only for the safety of the stock, but of the trains and passengers under its control." He thought that the danger to cattle could have been avoided by a small outlay, and that, not having made such outlay or taken any precautions for the safety of the cattle, the corporation should be held answerable. He said further: "To say that the use of salt is the only effective way of freeing frogs and switches from ice and snow in cold weather is to close our eyes to ordinary human experience. But to say that the use of salt is the only effective mode of freeing frogs and switches from ice and snow in cold weather, without additional expense for manual labor and proper lubricants, is, no doubt, true. If the company adopt the cheaper of two modes to accomplish the same purpose, it is no more than justice to require it to provide against the increased danger, occasioned by its choice, to the property of others. If, necessarily, I must maintain for my own benefit that which may be a nuisance to my neighbors, and I can provide against its dangerous character, it is my duty to do so, or be responsible to my neighbor for his loss resulting from my neglect. The company knew that the use of salt in this instance would result just as it did. It, by a small additional expenditure of labor and money, could have provided against it. This it failed to do, and therefore it should be made to pay the damage. In my opinion, the judgment is just, and should be affirmed.

RAILROADS—LIABILITY FOR KILLING LIVESTOCK.—A railroad company is not responsible for cattle attracted to a depot by hay loaded on its cars, and there killed by a train, provided the cars are not allowed to stand on the track an unreasonable time: *Schooling v. St. Louis etc. Ry. Co.*, 75 Mo. 518; *Harlan v. Wabash etc. Ry. Co.*, 18 Mo. App. 483. The same rule was adhered to in *Gilliland v. Chicago etc. R. R. Co.*, 19 Mo. App. 411, where corn was left on a car on a sidetrack.

**RAVENSWOOD, SPENCER, AND GLENVILLE RAILWAY
COMPANY v. RAVENSWOOD.**

[41 WEST VIRGINIA, 732.]

RAILWAYS—BONDS AND SUBSCRIPTIONS—CHANGE IN LOCATION OF ROAD AS AFFECTING RIGHTS TO.—If a railway had been located through a municipality, when a proposition was submitted to the authorities thereof, and a vote taken to determine whether it should subscribe for stock and issue bonds therefor, such location is presumed to be a part of the proposition, which cannot be afterward departed from without the consent of the voters, manifested as provided by law; and if the location of such road is subsequently changed without such consent, mandamus will not issue to compel the execution of the bonds. Nor can the corporation maintain its rights to such bonds by showing that the location of the road as thus changed is near the corporate limits and easily accessible to the inhabitants of the town, and that such limits might be extended so as to include the present location.

V. B. Archer, for the plaintiff in error.

Robert F. Fleming, Nathaniel C. Prickett, and William A. Parsons, for the defendant in error.

733 DENT, J. On the petition of the Ravenswood, Spencer & Glenville Railway Company, the circuit court of Jackson county issued a mandamus nisi against the town of Ravenswood et al., requiring them to appear and show cause, if any, why the authorities of said town should not be required to issue three thousand dollars of bonds of said town in payment of subscription to the capital stock of the petitioner, authorized by the voters of said town at an election held therein for that purpose on the second Tuesday in July, 1889.

734 The defendant appeared, and demurred to the said petition and writ. The demurrer having been overruled as a return thereto, they filed their separate answers. To these the plaintiff demurred, but the court overruled the demurrer; and, the plaintiff not pleading or replying to the answers, the court heard the case on the papers filed, orders had, and oral testimony, and entered a final order refusing the relief prayed, quashing the writ, and dismissing the petition. From this order a writ of error and superseas was awarded, and the plaintiff now here insists that the circuit court, in refusing the relief prayed, erred.

The answer of the town, by its officers, with great prolixity and at length denies everything set out in the alternative writ and petition, but from its numerous allegations the following is gleaned to be the real reason why the bonds were not issued, to wit: That the vote was taken and the bonds were authorized to be

issued by the voters of the town of Ravenswood, a small town situated on the Ohio river and Ohio River Railroad, containing about nine hundred inhabitants, with the understanding that the plaintiff's road would be built as then located through the corporate limits of said town, and that, after the vote was taken, the location was changed so as to throw the line without and several hundred feet to the south of the corporate limits.

To such allegation the plaintiff makes no reply or plea, but, in its evidence taken at the hearing, admits the change of location, but seeks to avoid its effect by showing that from the point where its road intersected with that of the Ohio River Railroad Company, it made traffic arrangements with the latter company for the period of ten years by which it was to use the latter company's tracks to reach and enter the corporation of Ravenswood, and also use its depots and terminal facilities therein, and insists that this is substantial compliance with all necessary conditions existing at the time the vote was taken.

There are numerous questions raised, but this presents the real gist of this litigation, the determination of which must settle this controversy. In the case of *Banet v. Alton etc. R. R. Co.*, 13 Ill. 504, it is held: "A subscriber to railroad stock will be held liable to the payment of his subscription although the legislature may have authorized, and the directors of the company may have adopted, a change of route from the first fixed by law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration." And in the case of *Sprague v. Illinois etc. R. R. Co.*, 19 Ill. 177, in approval of the foregoing decision, it is said: "In determining the question as to how far the original purposes of a corporation may be departed from after subscriptions have been made to its stock without violating the rights of the stockholders individually, we must first consider with what intention and in view of what advantage the law must presume such subscriptions are made. As is clearly manifest from the decision of the case above referred to, the conclusive presumption is, that it was with a view to the profits to be derived from the stocks thus subscribed as an investment, and not in reference to any incidental advantages which may accrue to the stockholders by reason of the construction of the improvement, in consequence of any anticipated enhancement of any other property which the stockholders may own, or otherwise": *Illinois etc. R. R. Co. v. Zimmer*, 20 Ill. 654; *Terre Haute etc. R. R. Co. v. Earp*, 21 Ill. 291; *People v. Holden*,

82 Ill. 93. These cases (and many others in support thereof might be cited) establish the rule that a subscriber to railroad stock is induced to grant his subscription thereto from the profits and dividends to be derived from the stock, and not from any supposed incidental advantage he may derive from the construction of the road on a peculiar location; and therefore he cannot escape the payment of his subscription because of a change in the location of the road detrimental to his private property.

This rule does not apply, however, to the subscriptions of municipal corporations under the laws of this state. They are not permitted to become subscribers to the stock of a railroad without regard to its location, but they are limited to such railroads as are located through, by, or near such corporations, being such railroads as will promote the general prosperity and welfare of the taxpayers of such corporations. It is a well-known fact that subscriptions ⁷³⁶ of stock are no longer made by municipalities to railroad companies through prospect of profit to be derived from the investment, for, while in name they are subscriptions to the stock, they are nothing more than gift, but that they are made to secure the indirect advantages to be derived from the construction of such railroad by the citizens of such municipality in the enhancement of their property, the increase of the population and taxable subjects and property, and the opportunities for labor and employment furnished. The actual location of the line of the road before the vote for a proposed subscription is had becomes an essential and important factor in securing the assent of the voters, and a material change of such location after such assent is secured is a breach of the condition on which said vote was had, sufficient to vitiate and render it invalid. In the case of *Platteville v. Galena etc. R. R. Co.*, 43 Wis. 493, it was held: "It is competent for a railroad company, in submitting to a municipality a proposition for aid, to define therein, as a part of the proposition, the line of the proposed road." And, if it does so, it is bound thereby. Such a proposition may be orally submitted, as well as in writing. And where the road has been already located through a town, and a proposition for aid is submitted to the authorities thereof, it must necessarily be presumed that such location was a part of the proposition. The time, terms, and conditions of the issuance of municipal aid bonds depend entirely on the consent of the legal voters: *Hodgman v. Chicago etc. Ry. Co.*, 20 Minn. 48. Such conditions cannot be departed from or changed without the consent of such voters, ascertained in the manner

provided by law: State v. County Court, 64 Mo. 30; Chapman v. Mad River etc. R. R. Co., 6 Ohio St. 119; Noesen v. Port Washington, 37 Wis. 168, 177.

In the case under consideration at the time the vote on the subscription was taken the railroad had been located through the corporation, and within its limits to the Ohio River Railroad depot; and it was fully understood by the voters that such was to be its route, as none other had been suggested. This would have been of great benefit to all those along and through whose property it passed, ⁷³⁷ making such property accessible to and useful for warehouses, freight depots, coal and cattle yards, etc., and enhancing the value of the property of the town generally as being near the permanent depots and terminus of such railroad, including its junction with the Ohio River Railroad. Ravenswood is a small country town, containing about nine hundred inhabitants, and including within its corporate limits about eighty acres. After the vote was taken, and resulted favorably, the location was changed so as to be entirely without the corporate limits, and several hundred feet south thereof, and to an intersection with the Ohio River road, at a point inaccessible to the town, except over the latter road, over which the plaintiff runs its trains into the town, by virtue of a ten years' lease, aforementioned. This may be in good faith, and it may not be. Plaintiff claims that it should be received as a full satisfaction to the town for its abandonment of its former route. Now, it is easy enough for the plaintiff, in conjunction with the Ohio River road, to relocate their depots at the junction of the two roads, and thus enhance the value of the real estate in the vicinity of such junction, and correspondingly depreciate the value of the property within the corporate limits of the town, and thus not only defeat the purposes for which said bonds were authorized, but greatly interfere with the prosperity of the town. It is true, the corporate limits could be extended so as to embrace the new location and terminus of the road, but this would not secure to the present residents of the town the benefits they expected to derive from the construction of the road as located when they authorized the issuance of the bonds. If there had been no location of the road at the time the vote was taken, and the proposition had been to build such road from or even through the town of Ravenswood to the other terminus thereof, then the building the road to the Ohio River road to a point so near the corporate limits and entering the town over the latter road, might well be deemed ample

compliance with the subscription proposition of the town, provided the assent of the voters could have been obtained to a proposition of so general a nature. But the change of the settled location of the road, as understood ⁷⁸⁸ by the voters at the time they gave their assent to the issuance of the bonds, whether for the benefit of the plaintiff or others, is undoubtedly a breach of the condition of their authorization, and an abandonment of the plaintiff's right to demand them.

The judgment is therefore affirmed.

RAILROADS—LOCATION—STOCK SUBSCRIPTIONS.—A party must pay the amount subscribed, where, to induce an organized railroad company to construct its road upon a particular route, he subscribes to a certain number of shares of stock upon condition that the prescribed route be taken, and the condition is complied with: *Spartonburg etc. R. R. Co. v. De Graffenreid*, 12 Rich. 675; 78 Am. Dec. 476; *McMillan v. Maysville etc. R. R. Co.*, 15 B. Mon. 218; 61 Am. Dec. 181. This question is further discussed in the extended note to *Parker v. Thomas*, 81 Am. Dec. 899.

INDEX TO THE NOTES.

ACKNOWLEDGMENT of conveyances before an officer interested therein, 708-803.

ADVANCEMENT, definition of, 54.

ARCHITECT, certificate of, agreement making necessary is valid, 812.

certificate of, arbitrary refusal to give, 812, 813.

certificate of, conclusiveness of, 814.

certificate of, conspiracy to withhold, 813.

certificate of, construction of, 814.

certificate of, damages recoverable for making false, 814.

certificate of, failure to obtain, when excusable, 812.

certificate of, given for a reward, 814.

certificate of, liability of builder may be dependent upon, 812.

certificate of, mistake in, 812.

certificate of, mistake or fraud in, 813.

certificate of, proof sufficient to overcome, 814, 815.

certificate of, refusal of architect to give, 812.

certificate of, waiver of, 813.

skill and ability, for want of which he is answerable, 412.

ASSIGNMENT of expectancies, 830-861.

of expectancies, when enforceable in equity, 843-845.

of expectant estates is void by law, 842.

of expectant estates statutes authorizing, how construed, 842.

of possibilities and contingencies not coupled with an interest, 842.

of possibilities coupled with an interest, 841, 860.

of the interests of heirs apparent, 842.

of things not in esse, are void at law, 842.

BANKING, check, difference between and a bill of exchange, 233.

check, whether actions may be sustained against banks thereon, 704.

check, whether constitutes an assignment of the funds drawn upon, 704.

insolvent banks, collections by, when become the property of the banks and when the property of the customers, 826.

BUILDING AND LOAN ASSOCIATIONS, definition of, 822.

usury, contracts of, when deemed to violate the law against, 822.

CARRIERS, by steamboat, liability of for moneys stolen from passengers, 621.

damages recoverable against for delay in transportation, 688.

liability of for acts of connecting lines, 688.

parol evidence to prove modification of written contracts of, 663.

CEMETERIES, dedication of, 87.

removal of remains, actions for, 87.

title of lotowners, nature of, 87.

CHATTEL MORTGAGES, after-acquired title, whether bound by, 720.

allowing sales in usual course of business, whether valid, 720.

CHILDREN, landowner's liability to for injuries from dangerous condition of his premises, 550.

CORPORATIONS, agreements for the election of particular persons as officers of, 140.

agreements to change officers upon a sale of stock, 141.

agreements to control the voting of stock, 141.

books and records, stockholder's right to inspect, 244.

considerations for agreements to control the voting of stock, 151.

elections of, injunctions to prevent voting of stock at, 142.

elections of, officers, power of to permit one person to vote the stock of another, 130.

elections of, officers, power to exclude votes, 138.

elections of, only bona fide stockholders entitled to vote thereat, 139.

elections of, proxies, irrevocable, given for an improper purpose, 140.

elections of, stipulations separating voting power from ownership of stock, 148.

foreign cannot be taxed on any principle different from that applicable to domestic, 374.

foreign, regulations and burdens which may be imposed upon, 374, 375.

franchises of may be taxed, 374.

irrevocable proxy, when will be enforced, 139-153.

power to purchase their own stock, 406.

priorities between creditors and stockholders, 405.

proxies, irrevocable, 130-153.

purchase of controlling interest entitles purchaser to stipulate for the election of officers in his interest, 141, 142.

revocation of proxies, 142.

transfers of stock, agreements forbidding, 151.

trust fund, capital stock, to what extent constitutes, 405, 406.

trusts and monopolies, agreements for, 140.

voting trusts, validity of, 139-153.

COVENANT, of warranty or nonclaim, effect of in an assignment of an expectancy, 351-353.

CRIMINAL CHARGES, agreements not to prosecute, when void, 480.

CRIMINAL LAW, escape of prisoner pending appeal, 693.

part of crime, prosecution for, when a bar to further prosecution, 22.

same act constituting two or more different offenses, 22.

DAMAGES, from fright, whether recoverable, 606.

DEAD, trespass for removing remains of, 87.

DEEDS, acknowledgment of, before an agent of one of the parties, 802.

acknowledgment of, before an attorney of one of the parties, 803.

acknowledgment of, before an officer who is agent of a corporation interested therein, 802.

acknowledgment of, by an officer who is interested but whose interest does not appear from the instrument, 801.

DEEDS, acknowledgment of, cannot be taken and certified by an interested party, 798, 799.

acknowledgment of, cannot be taken by an officer who is a grantee therein, 799.

acknowledgment of, cannot be taken by a party thereto, 798.

acknowledgment of conveyance of a married woman taken before her husband, 802.

acknowledgment of, interest which will disqualify an officer from taking, 799, 800.

acknowledgment of, is necessary to give validity to their record, 798.

acknowledgment of, made by a married woman before her husband, 801.

acknowledgment of, notaries public, interest which will disqualify them from taking, 800.

acknowledgment of, parol evidence to prove that it was before an interested officer, 801.

acknowledgment of, relationship of officer to party does not disqualify him from certifying, 801.

acknowledgment of, taken by a person named as trustee therein, 799, 800.

acknowledgment of, where county clerk is a party may be taken by his deputy, 801, 802.

DEFINITION, of a possibility, 340.

of advancement, 54.

of building and loan associations, 822.

of checks, 233.

of expectancy or chance, 339.

of expectant estates, 341.

of expectant heirs, 340.

of leading question, 117.

of marriage brokerage contracts, 97.

of penalty, 594.

of profits, 262.

of special deposits, 240.

ELECTRIC WIRES, care required of persons maintaining in public streets, 67.

street railways, liability of for negligence in maintaining, 68.

ELEVATORS, for freight, liability of owners of, 810.

for freight, persons using as passenger assume risks of, 809, 810.

for passengers, accidents in, liability for, 808.

for passengers, burden of proof in case of injury by accident, 807.

for passengers, care and caution which must be exercised by persons riding in, 807.

for passengers, care which owners of property must exercise respecting, 806.

for passengers, contributory negligence of persons injured by, 808, 809.

for passengers, duty of owners to make examinations to ascertain condition of, 806.

for passengers, employes, when may recover for injuries suffered from, 806.

ELEVATORS, for passengers, landlord's liability for to tenants and their visitors, 807.

for passengers, liability of owner cannot be avoided by proving that elevator was purchased from a competent manufacturer, 808.

for passengers, persons riding in may assume that elevators are in good condition, 807.

for passengers, skillful persons must be employed to operate, 807.

for passengers, tenants of building, when bound to keep in repair, 809.

EMPLOYER AND EMPLOYE, workmen, when may not recover for defects in materials used by them, 429.

ESTOPPEL, to defend against promissory note on the ground of forgery, 297.

EVIDENCE, parol effect of on contracts of insurance, 666.

parol is not admissible to contradict a writing, 659.

parol, rules respecting are the same in equity as at law, 661.

parol, to add to or vary a writing, 659, 660.

parol to apply the terms of a writing to the subject matter, 661.

parol to ingraft new terms in a writing, 660.

parol to explain a writing, 660, 661.

parol to prove collateral agreements, 661.

parol to prove discharge of written obligation, 662.

parol to prove stipulations made subsequent to a written contract, 661.

parol to prove the abandonment of a written contract, 672.

parol to prove time when a writing was to become operative, 661.

parol to show a warranty outside of the contract, 666.

parol to show the circumstances attending the entering into of a contract in writing, 661.

EXEMPTION, insurance on exempt property is exempt, 80.

EXPECTANCIES are not confined to the hopes of heirs, 341.

assignment of by an heir to his ancestor, 345, 346.

assignment of, consent of ancestor, when essential to enforcement in equity, 350.

assignment of, covenant to make, 350.

assignment of, equity may regard as mere security for money advanced, 345, 349.

assignment of, equity, when will not enforce, 343, 344.

assignment of, estoppel to dispute, 351.

assignment of, expectant estates, statutes authorizing construed, 342.

assignment of, founded upon valuable consideration may be enforced, 345.

assignment of husband's interest to be acquired in his wife's estate, 346.

assignment of, inadequacy of price as a ground for refusing to enforce in equity, 349, 354.

assignment of, instances, when will be enforced in equity, 347.

assignment of. instances in, which equity will set aside, 348-350.

assignment of is enforced in equity, when, 344, 345.

assignment of is regarded as a fraud upon an ancestor, 348.

assignment of is subject to the statute of frauds, 346.

EXPECTANCIES, assignment of is void at law, 342.

assignment of made voluntarily or to defraud creditors, 349.

assignment of, nothing passes by, 342.

assignment of possibilities coupled with an interest, 341.

assignment of, property and interests which may be passed by, 359.

assignment of, with the consent of the ancestor, 347, 350.

construction of assignments of, 359.

contingent remainders may be sold and transferred, 341.

conveyance of, with covenants of warranty, does not affect the heirs of the grantor, 351.

conveyance of, with covenants of warranty, effect of, 351, 352.

conveyance of, with covenants of warranty, nonclaim, effect of, 353.

conveyance of, without covenants of warranty, 351.

definition of, 339, 340.

difference between an expectation of an estate and an expectant estate, 341.

estoppel to dispute effect of assignment, 351.

inadequacy of price, English rule respecting assignments founded upon, 356-359.

inadequacy of price is evidence of fraud in the assignment of, 354, 355.

inadequacy of price is not alone sufficient to prevent enforcement in equity of assignment of, 354, 355.

inadequacy of price, if gross, is a ground for refusing enforcement of, 354.

heir apparent, conveyance by, of his interest in his ancestor's estate, 343.

legatee, assignment by, 361.

possibilities coupled with an interest may be devised, 340.

possibilities coupled with an interest, when assignable, 360.

possibilities not coupled with an interest are not, at law, the subject of disposition, 340.

reasons for denying effect to assignment of, 343.

specific performance of contracts to assign, 345, 349.

reversions and remainders may be released by the tenant in possession, 341.

reversions and remainders which are not, 340, 341.

vested remainders are not, and may be assigned, 340.

FORGERY, estoppel to defend against promissory note on ground of, 297.

GARNISHMENT of debts in other states, 286.

of wages in a state wherein they are not exempt, 286

HOMESTEAD, conveyance by husband in which wife does not join, 76.

HUSBAND AND WIFE, former as agent of the latter, 430.

INFANTS, disaffirmance by, return of consideration, when essential to, 51.

disaffirmance by, what essential to, 51.

ratification of contracts of, 52.

INSURANCE, against fire, what losses included within, 487.

conditions, waiver of by agent, 489.

false answers, parol evidence to prove that they were written by the agent of the insurer, 423.

forfeiture, waiver of by agent, 603.

notice of loss, when deemed to be immediate or forthwith, 487.

of exempt property, proceeds of are exempt, 80.

parol changes in terms of, 666.

proofs of loss must be made within time stipulated, 487.

JUDICIAL NOTICE, will not be taken of the laws of another state, 474.

LANDOWNER, trespassers, liability to for injuries resulting from the condition of his premises, 550.

LEASES, parol changes in, 667.

LIS PENDENS, abatement of suit or action followed by proceedings for foreclosure, 875.

alienees and grantees of the plaintiff are bound by, 868.

all are persons affected by the rules of, 870.

amendments to the pleadings not introducing any new cause of action, 868.

amendments to the pleadings, when do not bind prior purchasers, 867.

appeal, purchaser, when bound by final judgment, 876.

appellate proceedings, effect of, 875.

assignee in bankruptcy, whether bound by, 872.

bills of review, 876, 877.

close and continuous prosecution of suits, what deemed to be, 873.

codefendants, equities between, purchasers, when need not take notice of, 870.

collusive prosecution of suit, effect of, 873.

commencement of, what essential to, 859, 860.

continuing effect of, after the entry of a final judgment or decree 877.

cross-bill, effect of upon alienees and grantees of the plaintiff, 868.

courts cannot dispense with the effect of the rules of, 854.

date of commencement of in a suit in equity, 854.

delay in prosecution of suit, when fatal to the continuing operation of rules of, 873, 874.

description of property, pleadings, when sufficient to put purchaser on inquiry, though imperfect, 866.

description of property, subject to must be found in the pleadings, 866.

diligence in the prosecution of the suit is essential to the continued operation of the law of, 873.

diligence in the prosecution of the suit, what deemed sufficient, 873.

dismissal of suit, reserving right to bring another proceeding, 875.

divorce, suits for, effect of, 865.

equities existing before the commencement of the suit, whether may be perfected during its pendency by the acquisition of the legal title, 871.

essentials to the existence of, 866, 867.

facts disclosed by the pleadings must be taken notice of by purchasers and encumbrancers, 869.

- LIS PENDENS**, final judgment or decree, continuing effect of after the entry of, 877.
- foundation of the law, 833.
- in actions for trespass upon real property, 864.
- in actions to foreclose liens on personal property, 863.
- in actions to recover possession of personal property, 863.
- in proceedings against bankrupts and insolvents, 855.
- in proceedings against the administrator and estate of decedents, 855.
- in proceedings to foreclose liens, 855.
- in proceedings to forfeit the charter of a corporation, 864.
- in suits for divorce, 865.
- in suits for the appointment of receivers, 866.
- in suits to condemn lands, 853.
- in suits to enforce liens for taxes, 856.
- interests acquired during the pendency of, 858.
- interpretation of statutes modifying common-law rules of, 856, 857, 861.
- involuntary transfers are subject to the law of, 858.
- involuntary transfers pendente lite, purchasers under, whether bound by, 871.
- is constructive notice of the allegations in the pleadings, 858.
- jurisdiction of the court is essential to the operation of the rules of, 858, 859.
- national courts, effect of in proceedings within, 861, 862.
- national courts, state statutes respecting do not affect, 855, 861.
- necessity for rules of, 853.
- negotiable paper before maturity is not subject to the rules of, 863.
- negotiable paper, when subject to the rules of, 863.
- new suit, when regarded as a continuance of a pre-existing suit, 874.
- notice from the records of the court is not essential to the operation of the rules of, 854.
- notice of facts in pleadings, whether affects the parties in controversies respecting other property, 869.
- notice of immaterial matters stated in the pleadings, 869.
- personal property, whether subject to, 862.
- persons whose interest is not acquired from a party to the suit are not affected by, 870.
- presumption that all persons have knowledge of, 853.
- proceedings to which rules are applicable, 855.
- process, constructive service of, 861.
- process, service of, whether essential to, 860, 861.
- process, vacating service of, effect of upon, 861.
- property is not subject to unless directly affected, 864.
- property not necessarily bound by the judgment is not affected by, 869.
- property subject to, 862.
- property subject to must be pointed out by the pleadings, 866.
- property, when deemed to be directly affected by, 864.
- relation to the teste of the writ, 860.
- removal to another state of the subject-matter of, 859, 862.
- review, bills of, 876, 877.
- revivor of suit once dismissed, effect of, 874.

LIS PENDENS, revivor, suits of, reasonable time for instituting, what is, 875.

rule of, what is, 857.

rules of are applicable to all judicial proceedings, 855.

rules of are applicable to encumbrancers, 858.

rules of are applicable to sheriff's sales, 858.

service of writ or subpoena is essential to, 860.

statutes modifying are not applicable to proceedings in the national courts, 855.

statutes modifying, cases which do not fall within remain subject to the common law rules of, 856.

statutes modifying, construction of, 856, 857.

statutes modifying, must be complied with, 856.

statutes modifying the common law rules of, 865.

statutes requiring recorded notice of are not applicable where persons have actual notice, 856.

termination of, 877.

territorial limits within which the effect of is confined, 859, 861.

title paramount, holders of are not affected by, 870.

transfers made during are void, 857.

unrecorded conveyances, holders of, whether affected by, 599, 871.

vendee of purchaser pendente lite, whether bound by, 872.

writs of error or review, effect of, 875, 876.

MARRIAGE BROKERAGE CONTRACTS, definition of, 97.

MASTER AND SERVANT, minor employes, duty of employers to, 94, 95.

minor employes, risks assumed by, 94.

MINING, discovery which will justify location of mine, 585.

MORTGAGOR AND MORTGAGEE, contracts between to release or waive equity of redemption, 118.

relations between are not fiduciary when the mortgage does not convey the legal title, 117.

MUNICIPAL CORPORATIONS, ordinances of, liability of persons causing injury to others by not obeying, 549.

streets of, excavations in, liability for, 549.

streets of, extent to which may grant right to use for telephone and telegraph purposes, 532.

streets of, uses to which may be appropriated, 533.

torts, liability for, 158.

NEGOTIABLE INSTRUMENTS, alteration of, whether renders void, 711.

attorneys' fees, stipulations for, whether destroy negotiability, 787.

consideration sufficient to support, 480.

indorsers before delivery, whether liable as makers, 475.

transferor, liability of, 836.

PARDONS, effect of, 183.

statutory limitation upon power of, 183.

PARENT AND CHILD, custody of child, when may be taken from parent, 159.

PATENT RIGHTS, invalidity of the patent as a defense to an action for the purchase price, 649.

POSSIBILITIES, classification of, 340.

coupled with an interest, 340.

definition of, 340.

- PRACTICE**, continuance, denial of in a criminal cause, when not improper, 430.
- PRINCIPAL AND SURETY**, delivery of bond by an agent, sureties when bound by his act, 435.
- PROMISSORY NOTES**, parol modification of, 668, 669.
- OFFICIAL BONDS**, principal must sign or sureties are not bound, 482.
- RAILWAYS**, fences along right of way, where may be placed, 458.
- REPRESENTATION**, fraudulent for which an action may be maintained, 203.
- RES JUDICATA**, essentials, 400, 445.
tests of, 401.
- REVERSIONS AND REMAINDERS**, contingent may be sold and transferred, 341.
release of to the tenant in possession, 341.
when not classed as expectancies, 340, 341.
- SEDUCTION**, accomplishing by influence and persuasion, 25.
illicit acts with other men after the alleged seduction are not admissible, 25.
- SHIPPING**, seamen's wages, owner, when not liable, 394.
- SPECIFIC PERFORMANCE**, of contracts to assign expectancies, 345, 349.
- SUBROGATION**, who entitled to, 227.
- SUNDAY LAWS**, interference with interstate commerce, 692.
- SURETIES**, indulgencies which will release, 385.
- TAXATION**, of foreign corporations, 374, 375.
of franchises of corporations, 374.
- TELEGRAPH AND TELEPHONE CORPORATIONS**, negligence in maintaining wires, 68.
- TRADE**, contracts in restraint of, when valid, 655.
restraint of, conditions which amount to unlawful, 86.
- TRESPASSERS**, landowner's liability for injuries to, 114.
- TRUSTS**, resulting, when arise, 843.
- UNDUE INFLUENCE**, what is, 219.
- VENDOR'S LIEN**, subrogation thereto, 227
- VOTING TRUSTS**, of the stock of corporations, 139-153.
- WARRANTY**, covenant of, in an assignment of an expectancy, 351, 352.
implied on the sale of goods by a particular description, 642.
- WRITINGS**, carriers, parol evidence to prove modification of contracts of, 663.
carriers, posterior parol agreement, when may justify conduct of, 663.
consideration essential to support parol change of, 664.
declarations of the parties, evidence of cannot vary or add to, 660.
evidence to modify should be clear, 668.
insurance, change by parol of terms of, 666.
insurance, waiver by parol of conditions of, 666.
leases, parol changes in, 667.
modification of by parol, when valid, 666.
mortgages, parol changes in terms and conditions of, 667.

Warnings, parol agreements to change rates of interest, 664.

parol alteration or discharge, 662.

parol change of contract of insurance, 666.

parol change of place of performance, 664.

parol evidence affecting assignments, 663.

parol evidence of abandonment of, 662.

parol evidence of alteration of, 662.

parol evidence of oral stipulations made subsequent to the contract, 661.

parol evidence, rules respecting are the same in equity as at law, 661.

parol evidence to apply the terms to the subject matter, 661.

parol evidence to contradict, 659.

parol evidence to explain, 660, 661.

parol evidence to prove oral agreements, 661.

parol evidence to prove that the writing was a sham, 661.

parol evidence to prove the time when the contract was to become operative, 661.

parol evidence to prove waiver, abandonment, or discharge of, 672.

parol evidence to show the circumstances under which the contract was made, 661.

parol evidence to vary contracts of carriers, 663.

parol evidence to vary or ingraft new terms upon, 660.

parol extension of time for performance of contract, 664.

parol waivers of, evidence requisite to prove, 668.

promissory notes, parol agreements modifying, 668, 669.

promissory notes, varying by parol evidence, 669.

required by statute of frauds, whether may be changed by parol, 671.

sales, parol evidence to show change in contract of, 669.

specialties, parol executory agreements cannot modify, 669.

specialties, parol executory agreements, effect of in equity, 670.

specific performance of, parol evidence to show waiver of right to, 670.

INDEX.

ABORTION.

ASSAULT—CONSENT TO ATTEMPTED ABORTION—DAMAGES.—A person cannot maintain a civil suit to recover damages for an assault to which he consented. Hence, if two men are sued by a woman for damages for inducing her to submit to an attempted abortion on her person by a physician, and her pregnancy is not attributable to either of the defendants, she is not entitled to recover where she voluntarily left her home in one city and went to another place at which to have the operation performed, although the defendants procured the physician, and the jury should be so instructed. (Goldnamer v. O'Brien, 878.)

ACKNOWLEDGMENT.

ACKNOWLEDGMENT OF DEED, INTERESTED OFFICER, WHETHER MAY TAKE.—A notary public who is a stockholder and director in a corporation and also its attorney ought not to take and certify the acknowledgment to a trust deed in his favor, but his certificate of such acknowledgment is not void where there is no imputation of improper conduct or bad faith or undue advantage arising out of his relation to the corporation. (Cooper v. Hamilton, 795.)

See Deeds, 9.

ADVANCEMENTS.

1. ADVANCEMENTS—MONEY TO PROCURE RELEASE FROM PRISON.—It is not even prima facie an advancement, to a daughter, for a father in law to deed land to a third person, and to use the money received from its sale, in a lawful way, to procure his son in law's release from prison, although this is done at the daughter's request. (Booth v. Foster, 52.)

2. ADVANCEMENTS—EVIDENCE NECESSARY TO SHOW.—An advancement by a parent to a child is not shown without satisfactory evidence of an intention, coincident with the transaction, to treat it as a "portion or settlement in life," as an anticipation of the child's share, if the donor dies intestate; and the party asserting an advancement has the burden of proof. (Booth v. Foster, 52.)

3. ADVANCEMENTS, EQUALIZING, IN PARTITION AMONG HEIRS.—As incidental to a partition among heirs, a court of equity may adjust and equalize advancements; and an alienation by one of the joint owners does not affect this power, as the purchaser is chargeable with notice of all the equities existing between his vendor and the other joint owners. (Booth v. Foster, 52.)

AGENCY.

1. PRINCIPAL AND AGENT.—AN AGENT TO SELL HAS NOT IMPLIED AUTHORITY TO WARRANT the property sold, unless the sale is of a class which is ordinarily accompanied by a warranty. (Bierman v. City Mills Co., 635.)

2. PRINCIPAL AND AGENT—RATIFICATION OF WARRANTY.—A ratification must be with full knowledge of the agent's acts. Therefore, if a person, assuming to act as agent for another, makes a sale of the latter's goods with a warranty of quality, or fitness for some specific purpose, and the owner, on being advised of the sale, ratifies it, such ratification does not include a warranty of which he had no notice. (*Bierman v. City Mills Co.*, 635.)

3. AGENCY.—AN UNKNOWN PRINCIPAL MAY, UPON DISCOVERY, be held for the acts of his agent within the scope of the authority of the latter. (*Maxcy Mfg. Co. v. Burnham*, 436.)

4. AGENCY—REVOCATION.—Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency, unless notified of such revocation. This rule applies when a husband is acting as agent for his wife. (*Maxcy Mfg. Co. v. Burnham*, 436.)

5. RATIFICATION—WANT OF REPUDIATION OF AGENT'S ACTION.—If an agent presents a claim against an insolvent bank for money credited to him, but to which his principal is entitled, the latter cannot be held to have ratified its agent's act because of a neglect to repudiate it, if the claim was presented without the knowledge or consent of the principal. (*American Exchange Bank v. Loretta Min. Co.*, 233.)

ALTERATION OF INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—ALTERATION OF TO CONFORM TO THE INTENTION OF THE PAYEE.—If the payee of a negotiable instrument alters it in a material respect after its execution, without the consent of the maker, a recovery cannot be sustained on such instrument on the ground that, as altered, it conforms to the original intention of the parties. (*Newman v. King*, 705.)

2. NEGOTIABLE INSTRUMENT, ALTERATION AFFECTS INNOCENT PURCHASER.—If a negotiable instrument is altered after its execution by the payee, without the consent of the maker, it is thereby rendered void, even in the hands of a subsequent bona fide holder. (*Newman v. King*, 705.)

3. PROMISSORY NOTE, ALTERATION OF.—If, after the execution of a promissory note, the date is changed by the payee one day only, without the authority of the maker, the identity of the instrument is destroyed, and no recovery can be had thereon. (*Newman v. King*, 705.)

ANIMALS.

ANIMALS—"RUNNING AT LARGE," WHAT IS.—A colt about three months old, running along directly in front of, and by the side of, its dam, which is hitched to a wagon and is being driven through the streets of a city, is not "running at large," within the meaning of an ordinance prohibiting horses from running at large on the streets. (*Elliott v. Kitchens*, 69.)

APPEAL.

1. APPELLATE PRACTICE—BILL OF EXCEPTIONS.—Unless the record on appeal shows affirmatively that the bill of exceptions was filed after it was signed by the court, it does not become a part of the record and cannot properly be embodied in the transcript or considered on appeal. (*Prudential Ins. Co. v. Young*, 819.)

2. APPELLATE PRACTICE.—A verdict cannot be set aside as against evidence when the evidence is conflicting, unless the conclusion of the jury is clearly wrong. (*Atkins v. Field*, 424.)

3. APPELLATE PRACTICE.—EXCEPTIONS ON APPEAL must be specific, pointed, and explicit; and, if indefinite, cannot be considered. (*Atkins v. Field*, 424.)

4. APPELLATE PROCEDURE.—A QUESTION NOT RAISED AT THE TRIAL will not be considered for the first time on appeal. (*Reich v. Cochran*, 607.)

5. APPEAL—PRACTICE ON, WHERE PRISONER IS AT LARGE.—If a prisoner is convicted of a capital felony, but escapes from custody and is at large when his appeal is called for trial, the appellate court may, in its discretion, either dismiss the appeal, or hear and determine the assignments of error, or continue the case. If the prisoner does not return, after two years' indulgence, his appeal will be dismissed. (*State v. Cody*, 692.)

6. APPELLATE PROCEDURE.—UPON AN APPEAL IN CHANCERY the whole case is open for examination, and the decree will be affirmed if found to be correct upon any ground, although incorrect upon the ground assigned for it by the chancellor. (*Oppenheimer v. Bank*, 778.)

7. APPEAL FROM A FINAL DECREE DOES NOT BRING UP FOR REVIEW any former order or decree from which a separate appeal might have been taken within a time designated, if such time has been permitted to lapse without the taking of an appeal. (*Stout v. Philippi Mfg. etc. Co.*, 843.)

8. APPEAL, WHO MAY TAKE.—A PURCHASER PENDENTE LITE is not entitled to appeal, he not being a formal party to the record. (*Stout v. Philippi etc. Mfg. Co.*, 843.)

9. APPELLATE JURISDICTION—COST.—If the jurisdiction of an appellate court is limited to actions in which the amount in controversy exceeds three hundred dollars, the action of a trial court in awarding plaintiff costs for less than that sum cannot be reviewed upon appeal. (*Foley v. California Horseshoe Co.*, 87.)

10. PRACTICE—FINDINGS.—Where a judgment is entered by default after the publication of a summons, there is no necessity for findings, and, if any are made, they constitute no part of the judgment-roll, and the facts of the controversy must in the appellate court be sought in the complaint and judgment only. (*Murray v. Murray*, 97.)

11. JUDGMENTS—ERRONEOUS INSTRUCTIONS AS GROUND FOR REVERSAL.—A decree sustained by evidence cannot be reversed for erroneous instructions if the verdict is merely advisory. (*Shea v. Murphy*, 215.)

ARCHITECT.

See Building Contracts, 1-4.

ASSAULT.

1. ASSAULT TO MURDER—EVIDENCE—CONCLUSION OF WITNESS.—If the person assaulted, on a trial for assault with intent to murder, testifies that the defendant shot him without any cause or provocation, and that they had always been friends, it is proper to disallow a question asked him by counsel for the defendant as to whether or not the shooting was accidental, as the answer would be a mere conclusion of the witness. (*Gunter v. State*, 17.)

2. ASSAULT TO MURDER—MOTIVE—AGGRESSOR.—If there is evidence, upon a trial for an assault with intent to murder that the person assaulted and another, while on their way to the defendant's store, threatened to kill the defendant, which threat was communicated to him immediately afterward, and that upon their arrival at the store, armed with pistols, and after a few remarks be-

tween themselves, such other person fired at the defendant, whereupon the latter shot and killed him, and then shot and wounded the other, evidence that on the preceding night, these two men waylaid the house where defendant lived is relevant and admissible not only as tending to show their motive in going to defendant's store, but as corroborative of their communicated threats to kill the defendant, and to aid the jury in determining as to who was the aggressor. (Gunter v. State, 17.)

3. **ASSAULT TO MURDER—EVIDENCE—WHAT INADMISSIBLE.**—The testimony of a witness, on a trial for an assault with intent to murder a certain person, that he had sold a knife, several months before the assault, to another person who was killed by the defendant in the same difficulty, and had seen the person killed, before the homicide, try to cut the defendant on one occasion, is clearly inadmissible. (Gunter v. State, 17.)

4. **ASSAULT TO MURDER—EVIDENCE—CORROBORATION.** Upon a trial for an assault with intent to murder, after the person assaulted has testified that the assault was made without cause or provocation, and that, at the same time, the defendant killed another person by shooting him in the back, while he was making no demonstration toward the defendant, it is proper to allow this testimony to be corroborated by that of a witness, who had examined the body of the deceased, that there was a wound in the back, and it is unobjectionable for the witness to locate, upon the back of a solicitor, who is standing up, where the wound was on the dead man. (Gunter v. State, 17.)

5. **ASSAULT TO MURDER—EVIDENCE—AGE.**—There is no error, on a trial for an assault with intent to murder, in allowing the person assaulted to testify that he was but eighteen years of age at the time, as this tends to show the relative conditions of the parties at the time of the assault. (Gunter v. State, 17.)

See Abortion.

ASSIGNMENT.

1. **EQUITABLE ASSIGNMENT, ASSENT OF DEBTOR NOT ESSENTIAL TO.**—If one in whose favor a debt exists, or is to exist in the future, as where it is to arise from a contract already made or an arrangement already entered into, gives an order to another for the money so due, or to become due, the assent of the debtor is not necessary to the operation of such order as an equitable transfer of the fund as soon as it is acquired. (Merchants' etc. Nat. Bank v. Barnes, 586.)

2. **THE ASSIGNOR OF A NON-NEGOTIABLE INSTRUMENT WARRANTS,** by implication, that it is a valid and subsisting debt, and that the maker of the instrument is solvent, or will be when it becomes due. (Merchants' Nat. Bank v. Spates, 828.)

See Checks, 4; Counties; Limitations of Actions, 4; Negotiable Instruments, 16, 22.

ASSOCIATIONS.

ASSOCIATIONS—INCAPACITY OF MEMBER—RIGHTS OF BENEFICIARY.—A beneficiary named in the certificate of insurance of a member of a beneficial association who is insane or otherwise incapacitated from attending to business, is entitled to pay the assessments levied against such member, and if, after notifying the association of the incapacity of such member and requesting it to notify himself instead of the member of all assessments levied against the latter, the association fails to give him such notice, it

cannot forfeit the membership for nonpayment of assessments. (*Buchanan v. Supreme Conclave*, 774.)

See Railroads, 6-8, 11-15, 17.

ASSUMPSIT.

1. **ASSUMPSIT—SERVICES RENDERED UNDER PROMISE OF MARRIAGE.**—A person who renders services to another under promise and in expectation of marriage with the latter, but without expectation of compensation in money or money's worth, cannot, upon the breach of the promise, recover the value of such services in assumpsit. The only remedy, if any, is an action for the breach of the contract to marry. (*Lafontain v. Hayhurst*, 430.)

2. **AN ACTION OF ASSUMPSIT FOR MONEYS HAD AND RECEIVED** is an equitable remedy existing in favor of one person and against another, when that other has received moneys either from the plaintiff or from a third person under such circumstances that in equity and good conscience he ought not to retain the same, and which, *ex aequo et bono*, belongs to the plaintiff. (*Merchants' etc. Nat. Bank v. Barnes*, 586.)

ATTACHMENT.

1. **GARNISHMENT IN COURTS OF DIFFERENT STATES OF CONCURRENT JURISDICTION.**—If a corporation doing business in two states and subject to garnishment in both is first garnished for the debt in one of the states and then in the other, but at the suit of different plaintiffs, and makes a full disclosure in the latter state, and is nevertheless held liable in its courts, notwithstanding the previous garnishment, in the other state, and in pursuance of a judgment pays the indebtedness so garnished, such judgment and payment may be pleaded in abatement of the first garnishment, and constitute a defense to the other proceedings therein. (*Lancashire Ins. Co. v. Corbetts*, 275.)

2. **GARNISHMENT OF A DEBT IN ONE STATE DOES NOT NECESSARILY CONFER UPON THE COURTS OF THAT STATE EXCLUSIVE JURISDICTION** of that debt. (*Lancashire Ins. Co. v. Corbetts*, 275.)

3. **GARNISHMENT.**—A DEBTOR MAY AT THE SAME TIME BE SUBJECT TO GARNISHMENT IN TWO OR MORE STATES, irrespective of the state of residence or the citizenship of the creditor, if, at such time, actual service of process in different actions may be made upon such debtor in the different states, as where the debtor is a corporation doing business in all the states and having officers in each upon whom process against it may be served. (*Lancashire Ins. Co. v. Corbetts*, 275.)

4. **GARNISHMENT—JURISDICTION.**—A debt may be garnished in any state in which process of garnishment may be served on the debtor, or in which he might be sued and a personal judgment entered against him, based on service of process within the state. The effect of the garnishment is not dependent upon residence in the state of the creditor whose debt is garnished, nor is it necessary that the person or corporation garnished be a resident of the state, if he or it is within the state at the time the garnishment process is served. (*Lancashire Ins. Co. v. Corbetts*, 275.)

5. **GARNISHMENT OF THE SAME DEBT IN DIFFERENT STATES.**—If the same debt is garnished in different states, the plaintiffs first recovering judgment and obtaining satisfaction thereof obtain priority of right, regardless of the date of the different garnishments, provided there is no fraud or collusion on the part of the debtor. His payment of the judgment first recovered against

him is a bar to any further proceedings in the other case, though the garnishment therein is of prior date to that in the case in which the judgment was obtained and satisfied. (*Lancashire Ins. Co. v. Corbetts*, 275.)

6. GARNISHMENT, PAYMENT UNDER, WHEN DOES NOT BELIEVE DEBTOR.—A debtor having notice of the assignment of a debt made by his creditor cannot, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee. (*Merchants' etc. Nat. Bank v. Barnes*, 586.)

7. GARNISHMENT, OFFICER'S LIABILITY FOR MONEYS IMPROPERLY PAID TO HIM.—If, upon the service of a garnishment, the person garnished answers that he is indebted to the judgment debtor, and pays the amount of the debt to the officer, it having before such garnishment been assigned to another and the debtor notified of the assignment, the assignee cannot maintain an action against the officer to whom such payment is made. He is justified in receiving payment, and applying it upon the writ, and the remedy of the assignee is against the original debtor, who remains liable notwithstanding the payment, because he cannot, after notice of the assignment, relieve himself from liability by payment to a person other than the assignee. (*Merchants' etc. Nat. Bank v. Barnes*, 586.)

8. GARNISHMENT AND EQUITABLE TRANSFER, CONFLICT BETWEEN.—An order given on a debtor for the payment to the person in whose favor the order is drawn of a debt then existing, or in potential existence, though not accepted, takes precedence over a subsequent garnishment of the same debt. (*Merchants' etc. Nat. Bank v. Barnes*, 586.)

9. ATTACHMENT—MOTION TO DISSOLVE—JURISDICTION. After a defendant enters a general appearance and files an answer, the effect thereof is the same as if process had been served personally. Hence, if, after a defendant has been brought into court on attachment process, he subsequently enters a general appearance and files an answer, a motion to dissolve the attachment, on the ground that it will not lie under the statute, is properly dismissed as immaterial, upon the question of jurisdiction, for the defendant is otherwise in court. (*Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 682.)

10. GARNISHMENT—EXEMPTIONS—BURDEN OF PROOF.—The statutory rules governing the contest of exemptions where the rights of creditors, or third persons claiming the property, are involved, are not applicable to the trial of an exemption claimed directly by the judgment debtor, as where a city claims exemption as to certain property used for municipal purposes; and the burden of proof is upon the plaintiff, in such a contest, to show that insurance money, the proceeds of the property, after its destruction by fire, is subject to garnishment in the hands of the insurance company. (*Ellis v. Pratt City*, 76.)

11. GARNISHMENT—EXEMPTION OF INSURANCE MONEY. If city property, used for municipal purposes, is exempt, under the statute, from levy and sale under judicial process, insurance money, after a loss, takes the place of the property and is also exempt. Hence, a city hall, so used, is municipal property, and insurance money thereon, after a fire, is exempt from garnishment, although the building has been re-erected in better condition than before destruction, without using any part of the insurance money, which has not been collected, as these facts do not show that the city has waived or lost its claim of exemption. (*Ellis v. Pratt City*, 76.)

BANKRUPTCY.**JUDGMENTS PENDING BANKRUPTCY PROCEEDINGS.**

A discharge in bankruptcy is a bar to a judgment entered after the commencement of the bankruptcy proceedings, upon a claim provable in such proceedings. (Emery, Appellant, 440.)

BANKS.

1. BANKS AND BANKING—SALARY OF OFFICERS.—The power of bank directors under a statute authorizing them to appoint necessary officers and fix their salaries, is confined to fixing a recompense or reward to be paid for performing such services as are appropriate to, and required by, their duties as officers, and does not include power to give a "bonus" in addition to salary. (McNulta v. Corn Belt Bank, 203.)

2. BANKS AND BANKING—SALARY OF OFFICERS—BONUS. A sum fixed by the directors of a bank to be paid to their president in addition to a named salary, for his "acceptance" of the office and the performance of acts outside of the duties thereof, is a bonus and not salary. (McNulta v. Corn Belt Bank, 203.)

3. BANKING—DEPOSITOR'S RIGHT TO RECOVER HIS DEPOSIT AFTER INSOLVENCY.—Where a deposit has been kept separate and not fully received before formal insolvency, the depositor may claim it, and money received upon collections subsequent to the formal insolvency belongs to the owner of the paper, and can be recovered in full, if it can be traced to the particular paper. (American Exchange Bank v. Loretta Min. Co., 233.)

4. BANKING—APPROPRIATION OF MONEYS WHEN NOT EFFECTED BY BOOK-KEEPING.—If a bank, on being advised by telegram by A that a deposit has been made in another bank for the use of B, credits the latter with the sum named in the telegram, and charges it to the bank with which the deposit is claimed to have been made, such entries are provisional merely, and do not bind the bank to pay B's check until it receives notice from the bank wherein the deposit was claimed to have been made that it had accepted the deposit. In the absence of such notice, the moneys must be regarded as remaining with the bank where they were originally deposited, and the title thereto does not vest in the other bank nor in its receiver on its suspending business before receiving such notice. (American Exchange Bank v. Loretta Min. Co., 233.)

5. ONE BANK HAVING A RIGHT OF SETOFF AGAINST ANOTHER cannot exercise it as against an account of the other as trustee for a third person. (American Exchange Bank v. Loretta Min. Co., 233.)

6. A BANK RECEIVING MONEY FOR TRANSMISSION TO ANOTHER BANK is liable to the person depositing such moneys for the amount thereof, if, before they are transmitted and before the bank to which they are to be sent receives notice of them, it suspends business, and never afterward resumes. (American Exchange Bank v. Loretta Min. Co., 233.)

7. BANKING—SPECIAL DEPOSIT, WHAT IS.—If a draft is sent to one bank for the credit of another for the use of a person designated, a special deposit is thereby created in his favor, and the bank receiving the draft must retain its proceeds until they are drawn out by the other bank for the use of the person for whose benefit the deposit was made. The receiving bank cannot credit the draft to the other bank on the debt of the latter, and thus relieve itself from liability. (American Exchange Bank v. Loretta Min. Co., 233.)

8. BANKS, DUTY OF TO TRANSMIT MONEY.—A bank receiving a draft to be credited to the account of another bank, but for the use of a person designated, is charged with the duty of transmitting the moneys as directed or of holding them for the benefit of the person so designated. (*American Exchange Bank v. Loretta Min. Co.*, 233.)

9. BANKING CHECK, ACTION BY HOLDER OF.—An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim. (*Cincinnati etc. R. R. Co. v. Bank*, 700.)

10. BANKING—BURDEN OF PROOF.—If a person doing business with an insolvent bank, which subsequently fails, seeks to reclaim the proceeds of a check sold by it to such bank and paid for by its paper, which is afterward dishonored, on the ground that such proceeds have not been mingled with the proceeds of the bank, he must assume the burden of proof. If such check was forwarded to another bank for collection, and was by it collected and credited to the insolvent bank, and it does not appear whether the credit was made before or after the suspension of business by the latter, it is incumbent on the plaintiff suing the receiver of the insolvent bank for such proceeds to prove that they were not credited to it until after its failure. (*Klepper v. Cox*, 823.)

11. BANKS—RECLAIMING MONEY RECEIVED WHEN INSOLVENT.—Though a bank is known by its officers to be hopelessly insolvent at a time when it received a draft from one of its customers, and issued to him therefor its own draft upon another bank, which was subsequently dishonored, such depositor cannot recover of the receiver of the insolvent bank the draft so given to him, nor the proceeds thereof, if it forwarded such draft to its correspondents in another city, and it was by the latter collected and credited to the bank whence it came before the latter suspended business. Under these circumstances, the proceeds of the draft become mingled with the general fund of the banks, and cannot be reclaimed. (*Klepper v. Cox*, 823.)

BILLS OF EXCHANGE.

See Checks, 2; Negotiable Instruments, 14, 15.

BONDS.

See Suretyship, 2-4.

BREACH OF THE PEACE.

See Criminal Law.

BROKERS.

BROKERS—POWER OF, TO MAKE CONTRACTS IN THEIR OWN NAMES.—A broker cannot make a contract in his own name without the knowledge and consent of his principal that will bind both the principal and the other contracting party, or render the principal liable for commissions or damages for the nonperformance of the contract, though he receives a benefit from it. (*Hass v. Ruston*, 288.)

See Trover, 2.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS, CONTRACTS OF, WHEN USURIOUS.—If a building and loan association adopts and enforces a by-law which provides that no loan shall be made at a premium of less than twenty-nine and seven-eighths per cent, nor

more than thirty per cent, a loan made by it as a result of the by-law, and not of competition between bidders therefor, is usurious, and a contract for its repayment with such premium will not be enforced. The court will merely require the borrower to do equity by repaying the money borrowed with legal interest, after being first credited with such payment as he has made with legal interest. (*McCauley v. Building etc. Assn.*, 813.)

2. BUILDING AND LOAN ASSOCIATIONS.—A PREMIUM, TO BE LEGAL, must be one that is bid for a right of precedence in taking a loan at a competitive sale, and, when there is no such sale and no bid, there can be no legal premium. (*McCauley v. Building etc. Assn.*, 813.)

3. DEFINITION.—A BUILDING AND LOAN ASSOCIATION is an organization created for the purpose of accumulating a fund by monthly subscriptions and savings of its members to assist them in building and purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society upon good security. (*McCauley v. Building etc. Assn.*, 813.)

4. BUILDING AND LOAN ASSOCIATIONS—FIXED PREMIUM, WHAT IS.—A provision in the by-laws of a building and loan association declaring that no money shall be loaned for a greater premium than thirty per cent, nor a less premium than twenty-nine and seven-eighths per cent, provides for a fixed premium. (*McCauley v. Building etc. Assn.*, 813.)

See Taxes.

BUILDING CONTRACTS.

1. ARCHITECTS—RESPONSIBILITY OF.—The undertaking of an architect implies that he possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily and reasonably well, and that, in a given case, he will exercise his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect, and there is no implied promise that miscalculations will not occur. (*Coombs v. Beede*, 406.)

2. ARCHITECTS—RIGHT TO RECOVER COMPENSATION—MISCALCULATION.—In an action by an architect to recover for services, it is no defense for the owner, in the absence of allegations of fraud or mistake, or contract of warranty or guaranty, that the services were not beneficial to him for the reason that they were performed in a manner contrary to and in excess of his express direction, provided the architect has exercised his best skill and judgment but has made a slight miscalculation as to the cost. (*Coombs v. Beede*, 406.)

3. ARCHITECTS.—THE RESPONSIBILITY RESTING ON AN ARCHITECT is essentially the same as that which rests upon an attorney to his client, or upon a physician to his patient, or which rests upon anyone to another, where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. (*Coombs v. Beede*, 406.)

4. ARCHITECTS ARE NOT CONTRACTORS, but merely agents of the owners in the construction of buildings for the latter. (*Coombs v. Beede*, 406.)

BURIAL.

See Cemeteries.

CANCELLATION OF DEEDS.

See Homestead, 3.

CARRIERS.

1. CARRIERS OF PASSENGERS, LIABILITY OF FOR THEFTS OF MONEYS.—A steamboat company is liable to a passenger who has procured a stateroom for his comfort during his journey for moneys, reasonable in amount, considering such journey, lost from such room by theft, without negligence on the part either of the passenger or of the company. The relations between such a company and its passengers differ in no essential respect from those existing between an innkeeper and his guests. (*Adams v. New Jersey Steamboat Co.*, 616.)

2. CARRIERS—RULES—QUESTION FOR JURY.—Whether a rule adopted by a carrier of passengers is reasonable is not a question of fact for the jury, but of law for the court, when the facts are not in dispute, and are not of such a nature that reasonable men may differ in regard to the inference proper to be drawn from them. (*Barker v. Central Park etc. R. R. Co.*, 626.)

3. CARRIERS NEED NOT BRING HOME TO EACH PASSENGER KNOWLEDGE OF ANY REASONABLE AND JUST RULE which such carriers are seeking to enforce. (*Barker v. Central Park etc. R. R. Co.*, 626.)

CAR SERVICE ASSOCIATION.

See Railroads, 6-8, 11-15.

CAVEAT EMPTOR.

See Executors and Administrators, 3; Sales, 1.

CEMETERIES.

1. CEMETERIES—REMOVAL OF REMAINS—IRRELEVANT EVIDENCE.—In an action of trespass to recover damages for removing the body of plaintiff's child from its burial place upon land owned by the defendant, but used as a public cemetery, the real issue is the question of plaintiff's rightful possession of the soil where the body was buried. Hence, evidence as to where the coffin came from, who dug the grave, the cost of the casket, and the amount of other funeral expenses is wholly irrelevant and immaterial, and should be excluded. So, the fact that, when the defendant's agent removed the body of the plaintiff's child to another burial place, without notice to the plaintiff, such agent had knowledge of the plaintiff's residence, cannot be proved by evidence of transactions between the agent and plaintiff which occurred long before the agency was created. (*Bessemer Land etc. Co. v. Jenkins*, 26.)

2. CEMETERIES—LIMITATION UPON TITLE OF LOTOWNERS.—One's exclusive right to the possession of a spot of ground, in a public cemetery, in which his dead are buried, is limited to the time during which the ground is used for burial purposes; but, when the cemetery is discontinued, and the bodies are to be removed, notice should be given to the party entitled, if known, and it can be given, and, if he fails to remove the remains, the removal by others must be done in a decent manner. (*Bessemer Land etc. Co. v. Jenkins*, 26.)

3. CEMETERIES—REMOVAL OF REMAINS—POSSESSION GIVING RIGHT OF ACTION.—If one has been permitted to bury his dead in a public cemetery, by the express or implied consent of

those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to maintain an action of quare clausum fregit against the owners of the fee, or strangers who, without his consent, negligently or wantonly disturb it. (Bessemer Land etc. Co. v. Jenkins, 26.)

4. CEMETERIES—REMOVAL OF REMAINS—RIGHT TO MAINTAIN ACTION FOR.—As a dead body becomes, after burial, a part of the ground to which it has been committed, one who buries his dead in soil to which he has a freehold right, and to the possession of which he is entitled, can maintain an action of trespass quare clausum fregit against anyone who digs or disturbs the grave. (Bessemer Land etc. Co. v. Jenkins, 26.)

5. CEMETERIES—ACTION FOR REMOVAL OF REMAINS—DESCRIPTION OF PREMISES.—In an action of trespass for removing the body of plaintiff's child from its burial place, the complaint is not demurrable on the ground that the close alleged to have been broken is not described with sufficient accuracy, where it is described as a burial lot in a graveyard, near a city named, in a certain county, which graveyard is now included in land occupied by a designated manufacturing company, but which, for many years, has been used and occupied as a burying ground, having been dedicated for that purpose by the defendant. (Bessemer Land etc. Co. v. Jenkins, 26.)

6. CEMETERIES—DEDICATION OF LAND FOR—EQUITABLE ESTOPPEL.—If an owner of land leads the public to believe that he has dedicated it to a public use by permitting and encouraging people to bury their dead in a cemetery thereon, the principle of equitable estoppel applies with peculiar force, and he will not be allowed to deny the fact of such dedication, to the prejudice of those whom he has misled. He cannot, therefore, any more than a stranger, unlawfully interfere with or desecrate a grave by removing the remains therein. (Bessemer Land etc. Co. v. Jenkins, 26.)

7. NEW TRIAL—REMOVAL OF REMAINS FROM GRAVE—DAMAGES—EXCESSIVE VERDICT.—In an action to recover damages for the alleged unlawful removal of the body of plaintiff's child from an old to a new cemetery, a verdict for seventeen hundred dollars is excessive, and should be set aside for that reason, where the testimony shows that the new cemetery is more desirable for burial purposes than the old one, and that the disinterment and reinterment, although done without notice to the plaintiff, and without his knowledge or consent, were conducted in an orderly and decent manner. (Bessemer Land etc. Co. v. Jenkins, 26.)

8. CEMETERIES—REMOVAL OF REMAINS—RECOVERY OF DAMAGES FOR.—In an action to recover damages for the alleged unlawful removal of the body of plaintiff's child from one cemetery to another, it is error to instruct the jury that, if the plaintiff had actual possession of the soil where the body was buried, he is entitled to recover, where there is evidence that the plaintiff knew, or had notice that the defendant had discontinued the old cemetery, where the plaintiff's child was first buried, and that parties were requested to remove their dead to the new cemetery provided by the defendant in lieu of the old, notwithstanding there is also evidence that the defendant removed the body without notice to the plaintiff, without his knowledge or consent, and without notice to him to remove it. (Bessemer Land etc. Co. v. Jenkins, 26.)

9. CEMETERIES—REMOVAL OF REMAINS—BASIS OF ACTION FOR.—The right to bring an action to recover damages for unlawfully removing remains from a grave in a cemetery does not

rest upon such facts as the erection of a head-board at the grave, putting turf around it, and planting trees at the head and foot thereof, but upon the other and higher consideration of an easement or license. (*Bessemer Land etc. Co. v. Jenkins*, 26.)

10. CEMETERIES—REMOVAL OF REMAINS—DAMAGES—INJURY TO FEELINGS.—In an action of trespass to recover damages for the unlawful removal of plaintiff's child from its burial place, the injury to the natural feelings of the plaintiff may be considered, by the jury, in estimating the damages. (*Bessemer Land etc. Co. v. Jenkins*, 26.)

CHATTEL MORTGAGES.

1. MORTGAGE OF CHATTELS TO BE ACQUIRED.—A mortgage purporting to embrace stock in trade of the mortgagor and also such as shall be acquired in the same business by him does not of itself create a lien on the subsequently acquired property, but, if the instrument authorizes the mortgagee to take possession of such property, it is a continuing, executory contract; and if such after-acquired property is delivered by the mortgagor to the mortgagee, he thereby acquires a valid lien thereon. The rule is the same where the mortgagee takes possession without the consent of the mortgagor, but pursuant to a right reserved by the mortgage. (*Francisco v. Ryan*, 711.)

2. MORTGAGE OF CHATTELS—RIGHT OF MORTGAGOR TO MAKE SALES.—The fact that a mortgage of chattels stipulates that the mortgagor may remain in possession, and make sales of the mortgaged property in the usual course of business does not render the mortgage fraudulent and void as against any creditors of the mortgagor, except those who have seized the property under a writ of attachment or execution before possession thereof has been taken by the mortgagee either by consent of the mortgagor or pursuant to a provision contained in the mortgage. (*Francisco v. Ryan*, 711.)

3. MORTGAGE OF CHATTELS, WHEN AUTHORIZES THE TAKING OF POSSESSION OF AFTER-ACQUIRED PROPERTY. A mortgage of a stock of merchandise and also of such articles as shall be subsequently acquired as a part of such stock, and which authorizes the mortgagee to take possession in certain contingencies of the mortgaged property, authorizes the taking possession by him of subsequently acquired property. A mortgage of chattels, authorizing the mortgagee to take possession of the property when he deems it necessary for his better security, gives him the right to take such possession whenever, in his judgment, it is best for him to do so; and the rightful exercise of that authority does not depend on his having reasonable grounds of deeming it necessary for his security. (*Francisco v. Ryan*, 711.)

CHECKS.

1. BANKING.—A CHECK IS a draft or order upon a bank or banking-house purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand. (*Industrial Bank v. Bowes*, 228.)

2. BILL OF EXCHANGE, WHAT IS NOT.—A paper drawn by a person on a bank or upon a person acting as the banker of the drawer, and which directs such person or bank to pay a sum certified to be due by an architect's certificate, is not a bill of exchange, but a check. (*Industrial Bank v. Bowes*, 228.)

3. BANKING, CHECK, DRAWER, WHEN NOT RELEASED. A drawer of a check is not released from liability to the payee by the failure of the latter to present the check for payment and to

give notice of nonpayment, unless the drawer has suffered some loss or injury thereby. (*Industrial Bank v. Bowes*, 228.)

4. ASSIGNMENT, EQUITABLE, NOT AFFECTED BY THE DRAWING OF A CHECK.—The giving of a check upon a bank is not, unless it is accepted, an assignment of the depositor's claim, and passes no title, legal or equitable, to his moneys on deposit in such bank. (*Cincinnati etc. R. R. Co. v. Bank*, 700.)

See Banks.

CHILDREN.

See Parent and Child.

CLERK OF COURT.

See Officers, 2.

CLOUD ON TITLE.

CLOUD ON TITLE—REPAYMENT AS CONDITION OF RELIEF.—If a husband, after voluntarily conveying property to his wife, again conveys the same property in trust to secure money advanced at his request to discharge an existing lien against the property, the deed of trust cannot be set aside as a cloud on the wife's title, unless the money so advanced is repaid. (*Martin v. Martin*, 219.)

COMBINATIONS.

See Monopolies, 1.

CONFLICT OF LAWS.

CONFLICT OF LAWS.—NEGLIGENCE, PRESUMPTIONS RESPECTING, WHEN APPLIED TO ACCIDENTS HAPPENING WITHOUT THE STATE.—A statute of a state declaring that from an accident caused by a defect in a car or other appliance of a railway corporation negligence on its part may be presumed is applicable to the trial of an action brought by an employé of a railway to recover compensation for damages resulting from an accident occurring from such a defect, beyond the boundaries of the state. (*Pennsylvania Co. v. McCann*, 695.)

See Attachment, 1-5; Contracts; Evidence, 6; Patents, 2.

CONGRESS.

See Interstate Commerce, 2.

CONSTITUTIONAL LAW.

See Officers, 3; Statutes.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW.—THE OPINIONS OF THE FRAMERS OF A CONSTITUTION expressed during its preparation, as in debates in the constitutional convention, may be examined as tending to show their intentions. (*State v. Camp Sing*, 551.)

2. CONSTITUTIONAL LAW—LEGISLATIVE CONSTRUCTION.—If the legislature of a state has, ever since the adoption of its constitution, recognized the principle that the subject of license taxes is for the legislature, this construction is entitled to consideration when a statute is claimed to be in conflict with the constitution, because it imposes a license fee or tax. (*State v. Camp Sing*, 551.)

3. CONSTITUTIONS—CONSTRUCTION.—If there is no uncertainty or ambiguity in the words of a constitution, the apparent meaning must be given effect, and neither the legislature nor the courts have power to add to, or to take away from, that meaning. (State v. Sutton, 459.)

CONTRACTS.

1. TRADE, RESTRAINT OF, WHEN NOT UNLAWFUL.—If an association of firms engaged in the business of stevedoring in a city enter into a contract which provides that its object is to govern and control the business of master stevedores to be carried on by its members, and to divide the profits and losses of the business so carried on, that the association is to continue for five years, and is given power, through a majority of votes of its members, to fix a schedule of prices to be charged by its members, and that none of them will do work for any less price than that so fixed, except as may be allowed by the association, and that any member violating the contract shall pay the association a specified sum as liquidated damages, such contract will not be held to be unlawful as in restraint of trade, if it does not appear that the purpose thereof was any control of the business of the city wherein it was made to such an extent as to enable the members to exclude competition therein or to control the prices of such business. (Herriman v. Menzies, 81.)

2. A MARRIAGE BROKERAGE CONTRACT IS INVALID as being contrary to public policy, and services rendered under such a contract do not constitute any legal consideration, and afford no sufficient foundation to an action to recover a sum agreed to be paid therefor. An undertaking to procure a person to keep a promise of marriage already made is as much within the rule as a contract of marriage brokerage entered into in advance of such promise to marry. (Morrison v. Rogers, 95.)

3. CONTRACTS—ESTIMATES OF ENGINEER—CONCLUSIVENESS.—Parties cannot, by an agreement in advance, make conclusive the estimate of an engineer, but they may provide that such estimate shall be taken as prima facie true and correct. (Baltimore etc. Ry. Co. v. Scholes, 307.)

4. CONTRACTS—PLACE WHERE MADE—PRESUMPTION. A contract is presumed to have been made in the state in which an action is brought thereon. (Baltimore etc. Ry. Co. v. Scholes, 307.)

5. CONTRACTS IN PARTIAL RESTRAINT OF TRADE—VIOLATION OF—CORPORATIONS.—If several persons engaged in a business, at a certain place, sell it, and agree not to engage thereafter in the same business, in that place, it is a violation of the contract for any one, or all, of them to take stock in, help to organize, or manage a corporation formed to compete with the purchaser in such business. It is also a violation of the contract for the prohibited parties to furnish machinery, or capital, or a portion of either, in lieu of stock, in a corporation organized with a view of competing with the person protected by his contract against such injury. (Kramer v. Old, 650.)

6. CONTRACTS—SINGLE CONSIDERATION WILL SUPPORT SEVERAL DISTINCT STIPULATIONS.—The single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do, or refrain from doing, certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed. (Kramer v. Old, 650.)

7. CONTRACTS IN PARTIAL RESTRAINT OF TRADE ARE BINDING DURING LIFE.—If several persons engaged in a milling

business, at a certain place, sell it, and agree not to continue the business of milling in that place, the contract will be construed as binding each seller during his life, and will be upheld as valid. (*Kramer v. Old*, 650.)

8. MARRIAGE OR PROMISE OF MARRIAGE MAY BE A GOOD CONSIDERATION for a conveyance or contract only when the conveyance or contract is made in consideration of the marriage or promise of marriage. (*Lafontain v. Hayhurst*, 430.)

9. CONTRACTS—CONFLICT OF LAWS.—THE PLACE of the contract regulates its validity, interpretation, and the nature of its obligation. By "nature" is meant those qualities which inhere in and pertain to it; as, whether it is joint, or joint and several. (*Schultz v. Howard*, 470.)

10. CONTRACTS—VALIDITY—RELIEF.—If parties concerned in an illegal contract are in *pari delicto*, neither can obtain any relief. (*McNulta v. Corn Belt Bank*, 203.)

11. CONTRACTS—MENTAL CAPACITY.—A defendant resisting an action upon a contract made with him, on the ground of want of mental capacity, is not entitled to have the jury instructed that if he was mentally incompetent to protect his interests in making the contract, he should be found mentally incompetent, and the contract disregarded as invalid, although he understood it when he made it. (*Sands v. Potter*, 253.)

12. CONTRACTS—MENTAL CAPACITY.—Where defendant seeks to avoid a contract made by him on the ground of his want of mental capacity to enter into it, an instruction that though the jury should believe that he had insane delusions on some subjects, yet if such delusions in no way related to the plaintiff or the subject matter of the contract in question, and in making such contract defendant was in no sense influenced thereby, but in making the contract he possessed mind, memory, and sense sufficient to know and comprehend its scope and effect, then he was mentally capable of making it, is not incorrect. (*Sands v. Potter*, 253.)

See Injunctions, 8; Services.

CORPORATIONS.

1. CORPORATIONS.—THE VOTING POWER OF STOCK MAY BE SEPARATED from its ownership, as when a proxy is given, or an agreement made upon a sufficient and valid consideration by which some person is authorized to vote stock, though not the owner thereof. (*Smith v. San Francisco etc. Ry. Co.*, 119.)

2. CORPORATIONS—VOTING TRUSTS.—An agreement between stockholders of a corporation to vote their stock as a unit is not invalid because in restraint of trade. (*Smith v. San Francisco etc. Ry. Co.*, 119.)

3. CORPORATIONS—PUBLIC POLICY—AGREEMENT FOR VOTING STOCK.—It is not in violation of public policy or any rule of law for stockholders owning a majority of stock in a corporation to cause its affairs to be managed in such a way as they think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies to so vote it in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or what officers they will elect, or they may unite in the appointment of a single proxy to effect their purpose. (*Smith v. San Francisco etc. Ry. Co.*, 119.)

4. CORPORATIONS.—A PROXY MAY BE MADE IRREVOCABLE FOR A TERM OF YEARS as the result of a contract between

the purchasers of stock in the corporation that a majority of them, or their survivors, shall vote it as a unit during such term. (Smith v. San Francisco etc. Ry. Co., 119.)

5. CORPORATIONS—PROXIES.—NO PARTICULAR FORM of words is required to constitute a proxy. Like any other agency, an instrument creating it may be informal, but, if, in order to give effect to its language in view of the purpose for which it was executed, it is necessary to construe the instrument as creating an agency, such construction will be given. (Smith v. San Francisco etc. Ry. Co., 119.)

6. STOCKHOLDERS, PRIVATE AGREEMENT TO CONTROL THE VOTING THEREOF.—If several persons purchase stock in a corporation under an agreement between them that it shall be voted as a unit for the term of five years at all meetings for the election of directors, and that the persons for whom it shall be voted shall be determined by such purchasers, or their survivors, and that, if any of such stock shall be sold, an agreement shall be exacted from the vendees thereof that it may continue to be voted pursuant to such agreement, a majority of such original purchasers have the right to vote the whole of such stock contrary to the wishes of one of their number, who still retains his interest therein. The agreement is valid, and none of the parties can withdraw therefrom. (Smith v. San Francisco etc. Ry. Co., 119.)

7. CORPORATIONS, ONLY BONA FIDE STOCKHOLDERS MAY VOTE.—Under a statute requiring every voter at an election for directors of a corporation to be a bona fide stockholder having stock in his name on the stock-books of the corporation, persons in whose names stocks stand on such books, but to whom it was transferred by its owners to avoid their liability as stockholders for the debts of the corporation, are not entitled to vote. (Smith v. San Francisco Ry. Co., 119.)

8. CORPORATIONS—MEETINGS—NOTICE.—EVIDENCE that notice of a meeting of the board of directors of a corporation was deposited in the postoffice, properly stamped and addressed to a director, is prima facie proof that he received it, if the corporate by-laws are silent as to how such notice should be served. Such proof is not overcome by the fact that such director fails to remember receiving the notice, or has an impression that he did not receive it. (Ashley Wire Co. v. Illinois Steel Co., 187.)

9. CORPORATIONS—MORTGAGE—PRESUMPTIONS.—A mortgagee in a mortgage made by a corporation to secure an existing debt and extending its payment is entitled to rely on the same presumptions as to its regularity and validity as obtain in other cases. (Ashley Wire Co. v. Illinois Steel Co., 187.)

10. CORPORATIONS—MORTGAGE—VALIDITY.—A mortgage of corporate property is not invalid because of special provisions therein not shown by the record of the meeting of directors at which the mortgage was executed, if a draft thereof was before the meeting and its provisions were considered at that time. (Ashley Wire Co. v. Illinois Steel Co., 187.)

11. CORPORATIONS—MEETINGS.—A BY-LAW of a corporation requiring regular meetings of its directors to be held at its general office, does not prevent special meetings from being held at any place. (Ashley Wire Co. v. Illinois Steel Co., 187.)

12. CORPORATIONS—MEETINGS—NOTICE.—Notice of an adjourned meeting of the board of directors of a corporation, called to consider the report of a committee appointed at a former meeting to transact ordinary business of the corporation, need not state the business to be transacted at such adjourned meeting. (Ashley Wire Co. v. Illinois Steel Co., 187.)

13. CORPORATIONS—MEETINGS—NOTICE OF.—Although the signature of the secretary of a corporation to a notice of a director's meeting is made by a rubber stamp in the hands of the president, this does not affect the validity of the meeting attended by the secretary, who records its proceedings, treats it as regularly called, and its directions are binding on him. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

14. CORPORATIONS—BY-LAWS.—THIRD PARTIES who deal with a corporation in good faith and without notice, are not bound by rules adopted for its government, nor required to know the provisions of its by-laws. They have a right to assume that such rules and by-laws have been complied with. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

15. CORPORATIONS — IRREGULARITIES — NOTICE.—Third parties dealing with corporations in good faith and within the general scope of the corporate powers are protected against all irregularities in the performance of corporate acts, of which they have no notice. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

16. CORPORATIONS—MEETINGS—IRREGULARITY OF AS AFFECTING MORTGAGEE.—The irregularity of a meeting of the board of directors of a corporation, at which a mortgage of its property is executed, does not affect the mortgagee, dealing in ignorance and good faith with the corporation. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

17. CORPORATIONS—MEETINGS—NOTICE.—A record of a meeting of the directors of a corporation is notice thereof to its members. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

18. CORPORATIONS — MORTGAGE — DEFENSE ON FORECLOSURE.—The irregularity of a meeting of the directors of a corporation at which a mortgage of its property is executed is no defense to an action to foreclose the mortgage, provided the corporation has taken no steps to disaffirm the proceedings had at such meeting or to repudiate the mortgage. (*Ashley Wire Co. v. Illinois Steel Co.*, 187.)

19. CORPORATIONS—GUARANTY BY OFFICER.—A person who accepts a contract of guaranty from the general manager of a corporation purporting to bind it for his private indebtedness, knowing that such contract is not within the scope of the business in which the corporation is engaged and is beyond the power of the manager to make, cannot recover on the contract. (*Dobson v. More*, 184.)

20. CORPORATIONS—GUARANTY BY AGENT.—A general manager of a corporation, empowered by its by-laws to bind it by contracts for merchandise, and to sign notes, drafts, and acceptances, in payment of any proper indebtedness of the corporation, has no authority to bind it as a guarantor for the indebtedness of another. (*Dobson v. More*, 184.)

21. CORPORATIONS.—THE POWERS OF AN AGENT OF A CORPORATION to enter into contracts for and on behalf of the corporation are limited to those matters concerning which the charter and by-laws of the corporation authorize it to contract. (*Dobson v. More*, 184.)

22. CORPORATIONS—PURCHASE OF STOCK BY OFFICER—LIABILITY TO CREDITORS.—If the money of a corporation is used by its treasurer in the purchase of its stock by himself and other stockholders for themselves, with the consent of all the stockholders and officers of the corporation, he is personally liable for the money so converted and misapplied contrary to the rights of the creditors of the corporation. (*In re Brockway Mfg. Co.*, 401.)

23. CORPORATION—PROPERTY OF AS TRUST FUND—MISAPPLICATION OF BY TREASURER.—The treasurer of a corporation holds the money in its treasury to answer for the corporation debts if necessary; and, if he withdraws it, except according to law, he does so subject to a trust for the payment of such debts, and it is immaterial whether he gets the money by fair agreement with his associates or by a wrongful act. (In re Brockway Mfg. Co., 401.)

24. CORPORATIONS, PROPERTY OF AS TRUST FUND—MISAPPROPRIATION OF BY AGENT.—Creditors of a corporation may hold its agent personally liable for wasting its assets needed to satisfy their claims, on the ground that such action on his part constitutes a misapplication of trust funds. (In re Brockway Mfg. Co., 401.)

25. CORPORATIONS—PRIORITIES BETWEEN CREDITORS AND STOCKHOLDERS.—The stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefits of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum, after all demands on it are paid. (In re Brockway Mfg. Co., 401.)

26. CORPORATIONS—PROPERTY OF AS TRUST FUND.—The stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien thereon and the right of priority of payment over any stockholder. (In re Brockway Mfg. Co., 401.)

27. CORPORATIONS, DIRECTORS' LIABILITY FOR NOT MAKING REPORTS—STATUTE OF LIMITATIONS.—If the trustees or directors of a corporation are required to make certain annual reports of its existing indebtedness and on default of doing so are made liable to its creditors for the debts due them, a cause of action accrues in favor of such creditors upon the first default, and the statute of limitations then begins to run against them, and the fact that after the completion of another year, a like default is committed on the part of the trustees does not give rise to a new cause of action as to indebtedness existing at the time of the first default, nor prevent the period allowed by the statute of limitations from being computed from such original default. (State Sav. Bank v. Johnson, 591.)

28. CORPORATION, WHEN NOT CHARGEABLE WITH KNOWLEDGE OF ITS AGENT.—The fact that the president of a banking corporation knew of the insanity of an indorser of a promissory note does not charge the corporation with such knowledge, if he was not present when the indorsement was made, nor did he participate in the transaction out of which it grew, nor in any respect act as agent of the corporation in taking the note so indorsed. (Bank v. Sneed, 788.)

29. CORPORATIONS—VOID CONTRACTS.—An executed corporate contract, not merely ultra vires, but also void as against public policy, cannot be enforced in favor of either party to it. (McNulta v. Corn Belt Bank, 203.)

30. CORPORATIONS.—DEFENSE OF ULTRA VIRES is available to a corporation in an action to enforce the unexecuted part of a contract made by it. (McNulta v. Corn Belt Bank, 203.)

31. CORPORATIONS—RELEASE OF STOCKHOLDERS.—The directors of a corporation cannot release a stockholder from payment for his stock, nor make any arrangement with him by which the corporation, its creditors, or the state, shall lose any benefit from his subscription. (McNulta v. Corn Belt Bank, 203.)

82. CORPORATIONS—BONUS TO OFFICER—VALIDITY.—An agreement by the directors of a corporation to pay a bonus to their president for doing an act forbidden by statute, is void. (*McNulta v. Corn Belt Bank*, 203.)

83. CORPORATION—BONA FIDE STOCKHOLDERS—RATIFICATION OF UNAUTHORIZED ACT.—Bona fide stockholders in a corporation, for the purpose of ratifying the unauthorized act of its directors, are such only as own stock fully paid in and dedicated to the business of the corporation. (*McNulta v. Corn Belt Bank*, 203.)

84. CORPORATIONS.—UNAUTHORIZED ACTS OF DIRECTORS of a corporation can be ratified only by bona fide stockholders. (*McNulta v. Corn Belt Bank*, 203.)

85. CORPORATIONS—BONA FIDE STOCKHOLDERS—RATIFICATION OF UNAUTHORIZED ACT.—The same men sitting merely as temporary stockholders of a corporation to approve what they have just done as directors thereof, are not bona fide stockholders for the purpose of ratifying an unauthorized act of the directors. (*McNulta v. Corn Belt Bank*, 203.)

86. CORPORATION—BONUS TO OFFICER, WHEN INVALID. A bonus agreed to be paid by directors of a corporation to their president in consideration of his contemplated action in carrying out unlawful provisions of a by-law, for the future increase of the capital stock, and for controlling the transfer thereof, is invalid and cannot be recovered. (*McNulta v. Corn Belt Bank*, 203.)

87. CORPORATIONS — LIMITATIONS ON TRANSFER OF STOCK.—The right of a stockholder in a corporation to sell and transfer his stock cannot be restrained by a by-law, making such sale or transfer subject to the consent of the directors, or refusing to permit such transfer unless the directors are satisfied. (*McNulta v. Corn Belt Bank*, 203.)

88. CORPORATIONS—BONUS TO OFFICER—VALIDITY.—Directors of a corporation cannot vote a large bonus as compensation, in addition to salary, to one of their number as president, when he takes part in the proceedings, or his vote is essential to the adoption thereof. (*McNulta v. Corn Belt Bank*, 203.)

89. CORPORATIONS—BY-LAWS — INCREASE AND TRANSFER OF STOCK.—A by-law of a corporation which seeks to keep the future action of the stockholders in reference to an increase of capital stock in subjection to the will of the directors who pass such by-law, and which also attempts to limit the right to sell or transfer stock by imposing unreasonable conditions, is illegal and void. (*McNulta v. Corn Belt Bank*, 203.)

40. CORPORATIONS—INCREASE OF STOCK.—A resolution passed by the board of directors of a corporation cannot fix, in advance, the time for increasing the capital stock of the corporation, without reference to the action of the stockholders, or the method prescribed by statute. (*McNulta v. Corn Belt Bank*, 203.)

41. CORPORATIONS—INCREASE OF STOCK.—An increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders, at a corporate meeting, and in the manner prescribed by law. (*McNulta v. Corn Belt Bank*, 203.)

42. CORPORATIONS—INCREASE IN CAPITAL STOCK.—A corporation organized under a statute can increase its capital stock only in the mode prescribed by such statute. (*McNulta v. Corn Belt Bank*, 203.)

43. CORPORATIONS—WHO MAY ACCEPT SERVICE OF PROCESS.—A statute requiring the appointment of persons to accept service of process on behalf of the corporation does not become the

authority to other officers to make such acceptance, and if process is by law authorized to be served on a president, he may accept service of such process. (*First Nat. Bank v. Huntington Distilling Co.*, 878.)

44. A CORPORATION CANNOT TAKE ADVANTAGE OF ITS BEING INCORRECTLY NAMED AS A PARTY DEFENDANT in an action otherwise than by a plea in abatement. Failing to make such plea, a judgment against it cannot be avoided because of a misnomer. (*First Nat. Bank v. Huntington Distilling Co.*, 878.)

45. JUDGMENT AGAINST A CORPORATION INCORRECTLY NAMED IS VALID.—Hence a judgment against the Huntington Distillery Company cannot be treated as void because the true name of the corporation defendant was the Huntington Distilling Company. (*First Nat. Bank v. Huntington Distilling Co.*, 878.)

46. CORPORATIONS—STOCKHOLDER'S RIGHT TO EXAMINE BOOKS AND PAPERS.—An answer to a petition for a writ of mandate to compel the officers of a corporation to permit a stockholder and director thereof to examine such books and papers, which avers that the purpose of the petitioner is to discover some possible ground of attack upon the corporation and its management contrary to the interests of the company and for the private advantage of the petitioner, does not show any sufficient reason for not issuing the writ, but the courts have power to prevent any abuse by the petitioner of the right which he enjoys by virtue of his relation to the corporation. (*Stone v. Kellogg*, 240.)

47. CORPORATIONS.—A STOCKHOLDER HAS THE RIGHT TO INSPECT THE BOOKS AND OTHER PAPERS of a corporation under a statute giving him at all reasonable times the right to examine the records and books of account of the corporation. (*Stone v. Kellogg*, 240.)

48. CORPORATIONS.—STOCKHOLDER'S RIGHT TO INSPECT BOOKS.—An answer to an application by a stockholder for a writ of mandate to compel the submission of the books and papers of the corporation to his inspection, averring that the petitioner has been refused permission to examine any records and accounts which he was lawfully entitled to examine, is argumentative and insufficient. He is legitimately entitled to know everything of which the records, books, and papers of the corporation would inform him. (*Stone v. Kellogg*, 240.)

49. CORPORATIONS.—A STOCKHOLDER'S RIGHT TO EXAMINE THE BOOKS AND PAPERS of a corporation is absolute, except that it shall not be exercised from idle curiosity or for improper or unlawful purposes, under a statute of the state making it the duty of the directors of every corporation to keep correct books of account and of its business, and declaring that every stockholder shall have the right, at all reasonable times, by himself or his attorney, to examine the records and books of the corporation. Their custodian cannot question the motives and purposes of the stockholder in making the examination, and, if the right of examination is refused on the ground that its object is improper, the custodian must assume the burden of proving it to be so. (*Stone v. Kellogg*, 240.)

50. CORPORATIONS.—THE RECORDS AND BOOKS OF A CORPORATION ITS STOCKHOLDERS HAVE, at common law, the right to examine at reasonable times. This right is in many of the states subject to statutory regulations. (*Stone v. Kellogg*, 240.)

See Insurance, 17.

COTENANCY.

1. COTENANCY—RIGHT OF WAY.—HUSBAND AND WIFE, as tenants in common, hold by several and distinct titles, and the wife has an equal right with her cotenant to the use of a way that is reasonably suitable and convenient for the purpose for which it is granted, and she is not bound by a separate agreement of her cotenant made in relation thereto, without her knowledge or consent, and in disregard of her individual rights. (Morrison v. Clark, 395.)

2. COTENANCY—RIGHT OF WAY.—One cotenant of a right of way has no authority to fix the location thereof in accordance with his own personal preference or caprice by means of a private agreement made with the owner of the servient estate, in entire disregard of the rights and wishes of his cotenant. (Morrison v. Clark, 395.)

3. JUDGMENTS AGAINST COTENANTS—RES JUDICATA.—A judgment for or against one cotenant is not only not conclusive evidence, but, ordinarily, no evidence at all, against his cotenants. (Morrison v. Clark, 395.)

4. COTENANT—CONVERSION.—If one cotenant appropriates to his own use the whole of the proceeds of a sale of the common property without the consent of the other, the latter is entitled to treat the appropriation as a conversion, and to maintain an action therefor. (Knape v. Nunn, 642.)

5. COTENANTS—LIABILITY OF COTENANT TAKING NOTE AND SECURITY IN HIS OWN NAME.—If, after a sale of real property by cotenants, one of them, without the assent of the other, delivers the conveyance, taking in his own name a note and mortgage for the whole purchase price remaining unpaid, he at once becomes, at the election of his cotenant, liable for the latter's share. (Knape v. Nunn, 642.)

See Judgment, 13.

COUNTIES.

1. THE ASSIGNOR OF A VOID COUNTY WARRANT, who indorses his name thereon, guarantees that, notwithstanding its apparent invalidity, it will be paid if the assignee use due diligence to collect it, and, if not, that when due the assignor will refund the money paid him therefor. (Merchants' Nat. Bank v. Spates, 828.)

2. THE ASSIGNEE OF A VOID COUNTY ORDER cannot recover of his assignor the amount paid therefor when no offer to return such warrant to the assignor was made for more than five years, during which time no effort was made to collect it, and it would have been paid had diligence been used toward its collection. (Merchants' Nat. Bank v. Spates, 828.)

See Limitations of Actions, 4.

COURTS.

1. JURISDICTION, CONCURRENT OF COURTS OF DIFFERENT STATES.—The rule that where courts having concurrent jurisdiction, the one first acquiring jurisdiction will retain it until the matter is fully disposed of, does not apply to courts of different states. In such cases, the suits may proceed concurrently, and if parties, the judgment first rendered may be pleaded in bar of any further maintenance of the other suit. (Lancashire Ins. Co. v. Oorbetts, 275.)

2. JURISDICTION—PROBATE COURT.—A decree of a probate court pronounced upon a subject over which it has no jurisdiction is null and void. (Smith v. Wildman, 760.)

CRIMINAL LAW.

1. CRIMINAL LAW—BREACH OF THE PEACE—VALIDITY OF JUDGMENT.—If a breach of the peace is made punishable, both by statute and by ordinance, and one is convicted for that offense before a police court having jurisdiction thereof, upon a complaint charging him with violating the ordinance, and a sentence authorized by the statute is imposed, the judgment is valid, though the ordinance is void. (*Taylor v. Owensboro*, 361.)

2. CRIMINAL LAW—PUNISHMENT—TWO OR MORE OFFENSES IN ONE TRANSACTION.—One person may, at the same time and as part of the same transaction, commit two or more distinct criminal offenses, and a conviction or acquittal of one will not bar a prosecution and punishment for the others. Therefore, if one, in the same affray, shoots and kills one person, and, by a second act, shoots and wounds another, the two acts are distinct, and the party shooting may be indicted and punished separately for each. (*Gunter v. State*, 17.)

3. CRIMINAL LAW—PUNISHMENT—ACTS CONSTITUTING BUT ONE CRIME.—A defendant cannot be lawfully punished for two distinct offenses, growing out of the same identical act, where one is a necessary ingredient of the other. Hence, if the same act of unlawful shooting results in the death of two persons, a conviction or acquittal on a trial for the murder of one would be a good defense on a second trial for the alleged murder of the other. (*Gunter v. State*, 17.)

See Sunday, 1-3.

CUSTODY OF CHILDREN.

See Parent and Child.

DAMAGES.

1. DAMAGES.—PROXIMATE DAMAGES FOR NEGLIGENCE are such as are the ordinary and natural result thereof. Hence they do not include the mere frightening of a person and peculiar injuries, resulting from such fright, as where it occasioned a miscarriage. (*Mitchell v. Rochester Ry. Co.*, 604.)

2. DAMAGES FROM FRIGHT.—If there is no immediate personal injury to a plaintiff from the negligence of another, she cannot recover for injury occasioned by her fright arising from the negligent act, though in consequence of the fright she became unconscious, and had a miscarriage. (*Mitchell v. Rochester Ry. Co.*, 604.)

See Negligence, 1; Release.

DEAD.

See Cemeteries.

DEATH.

See Negligence, 1.

DEEDS.

1. AN UNRECORDED CONVEYANCE IS GOOD, except as against a person purchasing without notice thereof and for a valuable consideration. (*Lake v. Hancock*, 159.)

2. DEEDS—DELIVERY AFTER DEATH.—If a grantor executed a deed and placed it in the hands of a third party to be held and delivered to the grantee after the grantor's death, reserving to himself no control over, nor right to recall or revoke it, these facts constitute a valid delivery. (*Shea v. Murphy*, 215.)

3. **DEEDS.—UNDUE INFLUENCE** to render a deed void, must be of a character to deprive the grantor of free agency. (Shea v. Murphy, 215.)

4. **DEEDS—MENTAL CAPACITY TO MAKE.**—The fact that the mind of a grantor may have been somewhat impaired by age or disease does not justify a court in setting aside his deed. The deed is valid if the grantor has sufficient mental capacity to properly understand and comprehend its nature, character, and scope. (Shea v. Murphy, 215.)

5. **DEEDS—EVIDENCE TO IMPEACH.**—Statements made by a grantor are inadmissible in evidence to impeach his deed. (Shea v. Murphy, 215.)

6. **DEEDS—RECORD OF AS NOTICE—DESTRUCTION OF RECORD.**—Under a statute providing that deeds duly acknowledged, certified, and recorded, shall, from the time of filing "with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice, the recording of a deed is notice, although the record thereof is afterward destroyed. A purchaser at tax sale against the apparent owner is not protected against the real owner, the record of whose deed has been destroyed. (Geer v. Missouri Lumber etc. Co., 489.)

7. **DEEDS—IDENTITY OF NAME AND PERSON.**—If the name of a grantor in a deed and in the patent to land is the same, and the land conveyed is identical, the proof of identity of person is prima facie sufficient, though the residence recited in the patent is different from that recited in the deed. (Geer v. Missouri Lumber etc. Co., 489.)

8. **DEEDS—PROOF OF EXECUTION—PRESUMPTION OF GENUINENESS.**—A deed dated more than thirty years before its introduction in evidence, and which has been recorded about twenty-four years, and is in the possession of the party claiming title through it, is presumed to be genuine though it contains no acknowledgment, if there is nothing suspicious about it. (Geer v. Missouri Lumber etc. Co., 489.)

9. **DEEDS—ACKNOWLEDGMENT—NOTICE.**—Under the Missouri statute, an unacknowledged deed which has been recorded one year prior to 1887, is made to impart notice to all persons of its contents, and all subsequent purchasers are deemed to purchase with notice thereof. (Geer v. Missouri Lumber etc. Co., 489.)

10. **DEEDS—RECORD OF IN ONE COUNTY AS NOTICE IN ANOTHER COUNTY.**—The record of a deed in one county, where the land is situated at the time when the record is made, is constructive notice to a subsequent purchaser after the land has been attached to another county, though no record of the conveyance has been made in that county. (Geer v. Missouri Lumber etc. Co., 489.)

See Officers, 2.

DEPOSITIONS.

DEPOSITIONS.—EX PARTE CERTIFICATES are not depositions; neither are they such documentary testimony as may, by a rule of chancery practice, be proved viva voce at the hearing. They are purely hearsay and, upon objection, are not admissible in evidence. (American etc. Mortgage Co. v. Dykes, 88.)

DEVISE.

1. **DEVISE — VESTED REMAINDER — AGREEMENT BETWEEN REMAINDERMEN TO CHANGE TERMS OF WILL.**—If land is so devised, with words of survivorship, that each of three

sons of the testator takes a vested remainder in the land, it is competent for them to stipulate, among themselves, against the divestiture of that estate by the death of any one or more of them; and an agreement, among them, that the will may be construed to mean that, if either should die, leaving children, they shall take the same share that their deceased parent would have taken had he lived, has the effect of eliminating from the will the limitation as to survivorship of the three sons; and, upon the death of one of the sons, his remainder in fee in the land vests at once under such an agreement, in his heirs at law, and they can maintain ejectment to recover the interest. (Thorington v. Hall, 54.)

2. DEVISE—VESTED REMAINDER—DIVESTITURE.—Under a will devising land to the testator's widow, during her widowhood, to be immediately divided, upon her marriage, into four equal parts, one to go to his wife and the other three at once to his three sons, or the survivors or survivor of them; but which will gives the wife power and authority, in case of her death unmarried, to dispose of the land, by her will, to the sons, or the survivors, in such shares or proportions as she may think proper; and, in the event of her death without exercising such power of appointment, the estate to go to the three sons, share and share alike, or to the survivors or survivor of them; each son takes a vested remainder in the land subject to divestiture, as to any one of them, by his death before the falling in of the preceding estate in the widow, and as to all of them by the exercise, in the prescribed manner, of the power of appointment conferred upon the widow by the will, and subject, also, to open and let in the widow, in the event she should marry again; or it may be subject to divestiture, as to one-fourth part of the estate, by her marriage. (Thorington v. Hall, 54.)

EASEMENTS

See Judgment, 13.

EJECTMENT.

See Judgments, 2.

ELECTRIC COMPANIES.

1. ELECTRIC WIRES—DUTY OF STREET RAILROADS AS TO CONDITION OF TROLLEY WIRES—NEGLIGENCE.—Although an electric street railroad company erects and maintains its trolley wire in the manner that other trolley wires are erected and maintained by many prudent and well-managed electric railway companies, conducting the same character of business over and along the streets of other cities, it is negligent where it knowingly suffers a wire of a telephone company to be suspended over its own, in a condition likely to fall across its own, involving danger to persons and property on the street, without providing proper safeguards; or where, after the fall of such wire across its own, the railroad company allows it to remain in that condition. (McKay v. Southern Bell Teleph. Co., 59.)

2. ELECTRIC WIRES—CONTACT OF TROLLEY AND TELEPHONE WIRES—NEGLIGENCE—WHAT IS NO DEFENSE.—In a joint action against a telephone company and an electric street railroad company, for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, it is no defense, on the part of the railroad company, that it had lawful authority to construct and operate its road with the motive power employed, where it, with knowl-

edge that a frail, weak, insecurely fastened telephone wire, liable to fall across its trolley wire, and extend to the ground, charged with a deadly current of electricity, thus imperiling life and property along the highway, was maintained by the telephone company; took no steps to avoid destructive consequences, and allowed the telephone wire, after it had fallen, to remain lying across its trolley wire, extending to the ground, thus injuring the plaintiff's property. (*McKay v. Southern Bell Teleph. Co.*, 59.)

3. ELECTRIC WIRES — NEGLIGENCE — INSUFFICIENT PLEA.—In a joint action against a telephone company and an electric street railroad company for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, and which damages were alleged to have been caused by the defendants' negligence, a plea of the telephone company, confessing that, after the telephone wire fell across the trolley wire, and extended to the ground, charged with the dangerous current of electricity, both defendants allowed it to remain in that condition, causing the plaintiff's injury, is insufficient, and a demurrer to it should be sustained. (*McKay v. Southern Bell Teleph. Co.*, 59.)

4. ELECTRIC WIRES—NEGLIGENCE—PLEADING.—If the complaint, in a joint action against a telephone company and an electric street railroad company, for damages to property caused by contact with a telephone wire, which had broken and fallen across the railroad company's trolley wire, thereby becoming charged with a deadly current of electricity, alleges that, known to the defendants, the wire was frail and weak, not securely fastened to the poles, and was liable to break and fall across the trolley wire, and that it was the duty of the defendants to so maintain, guard, and protect their wires as to prevent such an occurrence, a plea of the telephone company that its wire was in good order and condition, and properly located and maintained, is not a denial of the allegations of the complaint. (*McKay v. Southern Bell Teleph. Co.*, 59.)

See Judgment, 1.

ELECTRIC WIRES.

See Municipal Corporations, 17.

ELEVATORS.

1. ELEVATORS.—THE OBLIGATION TO PASSENGERS IN ELEVATORS or to persons who are about to become passengers thereon, is the same as that of a common carrier of passengers, which is that the highest degree of care and caution must be exercised for their safety. (*Southern Building etc. Assn. v. Dawson*, 804.)

2. ELEVATORS, LEAVING OPEN AND UNATTENDED.—The owner of a building who leaves a passenger elevator therein open and unattended is guilty of negligence, and if a person enters it and is injured, the owner is answerable, if, under the circumstances, such person was not guilty of contributory negligence; and whether he was so guilty is a question of fact for the jury to determine under proper instructions from the court. (*Southern Building etc. Assn. v. Dawson*, 804.)

EQUITABLE ASSIGNMENT.

See Assignment.

EQUITY.

1. EQUITY—"HE WHO SEEKS EQUITY MUST DO EQUITY." Equity cannot require of a complainant, as a condition of relief to which he is otherwise entitled, the performance of conditions not

warranted by settled principles of equity, but the maxim that he who seeks equity must do equity may be applied and conditions of relief imposed in favor of defendant in many cases where he could obtain no independent or affirmative relief. (*Martin v. Martin*, 219.)

2. **EQUITY—RELIEF AGAINST MISTAKE.**—A surety on the bond of a defaulting bank cashier, who, laboring under a mistake of the legal effect of the facts, gives his notes in settlement of such defalcation, is not entitled to a redelivery of the notes to him unless the parties have remained, or can be placed, in statu quo. (*Fink v. Farmers' Bank*, 746.)

3. **EQUITY—RELIEF AGAINST MUTUAL MISTAKE.**—Equity cannot grant relief in cases of mutual mistake of legal rights, where it is impossible to restore both parties to the status quo. (*Fink v. Farmers' Bank*, 746.)

4. **FRAUD, PARTICEPS CRIMINIS.**—Equity will not help one guilty of fraud against another guilty in the same transaction. (*Stout v. Philippi Mfg. Co.*, 843.)

5. **PRACTICE IN EQUITY.**—Answers and other pleadings, except in cases of injunction, can be filed only at the rules or in court, and not before a commissioner. (*First Nat. Bank v. Huntington etc. Co.*, 878.)

See Homestead, 3; Insolvency, 1.

EQUITY OF REDEMPTION.

See Mortgages, 1.

ESTATES.

1. **A LIFE TENANT** may lawfully mine, sever, and convert the mineral from land into personalty, if the mines were open when the tenancy for life was created. (*Koen v. Bartlett*, 884.)

2. **LIFE ESTATE, RESERVING IN A CONVEYANCE.**—A grantor may, in a conveyance creating a fee, reserve to himself the usufruct of the property for his life. (*Koen v. Bartlett*, 884.)

ESTOPPEL.

1. **FRAUD—ESTOPPEL.**—If fraudulent and false representations are made with the knowledge and advice or upon instruction of the party seeking to take advantage thereof, he is estopped from setting up his own fraud, and parol evidence thereof is admissible to establish the estoppel. (*Marston v. Kennebec Ins. Co.*, 412.)

2. **JUDGMENTS AS ESTOPPEL.**—A judgment, to be conclusive as an estoppel, must have been rendered upon the merits of the case, and the same subject matter. (*Embden v. Lisherness*, 442.)

3. **ESTOPPEL BY JUDGMENT MUST BE MUTUAL**, and a ward or cestui que trust is not bound by a judgment unless the guardian or trustee is also bound. (*State v. Branch*, 533.)

4. **ESTOPPEL—MARRIED WOMAN.**—As possession, without a lease, does not create an estoppel, a married woman is not estopped to deny the title of a grantor by the fact that she is in possession of the land with her husband, who is the grantee's tenant, where she claims no estate through, by, or under, her husband's contract, and is not a privy in estate under or through him. (*Shew v. Call*, 678.)

See Insurance, 8; Judgment, 6, 10; Landlord and Tenant, 3; Municipal Corporations, 15; Negotiable Instruments, 1.

EVIDENCE.

1. **EVIDENCE.—A WRITTEN INSTRUMENT** may be shown to be void by parol evidence; and it may be thus attacked and overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the contract. (*Marston v. Kennebec Ins. Co.*, 412.)

2. EVIDENCE — ENGINEER'S ESTIMATE — ATTACK FOR FRAUD OR MISTAKE.—An engineer's estimate is presumed to be correct, but is subject to attack for fraud or mistake, and the burden of proof is upon the attacking party. (Baltimore etc. Ry. Co. v. Scholes, 307.)

3. JUDGMENTS—EVIDENCE.—If the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence. (Embsen v. Lisherness, 442.)

4. NEGOTIABLE INSTRUMENTS—SECOND INDORSEMENT —PAROL EVIDENCE TO VARY.—It is not competent, as between a second indorser and a subsequent holder of the note, to vary the legal effect of the second indorsement by parol evidence, whether the holder is an innocent purchaser or not. (Bowler v. Braun, 449.)

5. EVIDENCE—MODIFICATION OF WRITTEN CONTRACT BY PAROL.—The rule that parol evidence cannot be received to contradict, add to, modify, or explain a written contract does not apply where the modification is alleged to have been made subsequent to the execution of the writing. Hence, after a contract has been reduced to writing, the parties may, before a breach thereof, make a new and valid contract, not in writing, either annulling the former agreement altogether, or adding to, subtracting from, varying, or qualifying its terms. (Harris v. Murphy, 658.)

6. EVIDENCE—CONFLICT OF LAWS.—THE RULES OF EVIDENCE IN FORCE IN A STATE are applicable to all causes tried therein, whether the cause of action arose within or without the state, and whether the parties thereto are residents or nonresidents. (Pennsylvania Co. v. McCann, 695.)

7. EVIDENCE.—STATUTES OF ANOTHER STATE must be pleaded and proved as any other fact. The courts will not take judicial notice of them. (Schultz v. Howard, 470.)

8. EVIDENCE—LAWS OF ANOTHER STATE—PRESUMPTION.—In the absence of an allegation to the contrary, a court will assume that the law of another state is the same as the law of this state. (Schultz v. Howard, 470.)

9. EVIDENCE—PHOTO-LITHOGRAPHIC COPIES of a party's signature, the originals of which cannot be produced, are not admissible to prove the genuineness of a signature purporting to be that of the same person, in the absence of preliminary proof that such copies are exact and accurate in all respects, and the affidavit of the custodian of the originals that such copies are a true and literal exemplification of the originals is not sufficient. (Geer v. Missouri Lumber etc. Co., 489.)

See Witnesses, 1-5.

EXECUTION.

EXEMPTION OF WAGES.—Under a statute exempting from execution or attachment the wages of any mechanic or laboring man, one employed to puddle iron at a specified rate per ton, and who is required to commence and quit work at specified hours, is entitled to hold as exempt moneys due him for such work. (Adcock v. Smith, 810.)

See Homesteads, 1.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—PROBATE SALES —JURISDICTION—COLLATERAL ATTACK.—In proceedings in a probate court to sell real estate for the payment of a decedent's

debts, the court must be satisfied independent of the facts stated in the petition, before making an order of sale, that there are unpaid debts properly chargeable upon the real estate of the decedent, and that the real estate described in the petition is bound by the lien of such debts, and that it is necessary to have recourse to the land to pay them, otherwise the sale is unauthorized and subject to collateral attack. (Smith v. Wildman, 760.)

2. EXECUTORS AND ADMINISTRATORS—PROBATE SALES—COLLATERAL ATTACK.—An unauthorized decree of a probate court for the sale of a decedent's lands is not valid until reversed in the regular course of appeal, but may be attacked in a collateral suit by or against any party claiming under that decree. (Smith v. Wildman, 760.)

3. EXECUTORS AND ADMINISTRATORS—PROBATE SALES—CAVEAT EMPTOR.—The rule of caveat emptor applies to probate sales and disappointment in the title is no ground for relief. The purchaser is bound to see that the proceedings are sufficiently regular to authorize the sale. (Smith v. Wildman, 760.)

4. EXECUTORS AND ADMINISTRATORS—PROBATE SALES—STATUTE OF LIMITATIONS.—An administrator's sale of the real estate of a decedent directed by the probate court for the payment of his debts barred by the statute of limitations is null and void. (Smith v. Wildman, 760.)

EXEMPTION.

See Execution; Partnership, 1

EX PARTE CERTIFICATES.

See Depositions.

EXPECTANCIES.

EXPECTANCIES—SALE OR ASSIGNMENT OF, BY HEIR. A naked possibility or contingency, not founded upon a right or coupled with an interest, cannot be assigned or sold. Hence, the naked possibility or expectancy of an heir to inherit his ancestor's estate is not the subject of sale or assignment, and such a contract, if made, is not enforceable, either at law or in equity, upon the ancestor's death. (McCall v. Hampton, 835.)

FALSE REPRESENTATIONS.

See Fraud, 1, 2

FIDELITY INSURANCE.

See Insurance, 12-15

FOREIGN CORPORATIONS.

See Taxes.

FORGERY.

See Negotiable Instruments, 1

FORMER ACQUITTAL.

FORMER ACQUITTAL, PLEA OF, WHEN INSUFFICIENT AND DEMURRABLE.—If one is indicted for an assault with intent to murder, a plea of former acquittal under an indictment charging him with the murder of a different person, where the assault and killing charged were done at the same time and place, is not good, unless it positively and clearly alleges that there was but one act or blow which resulted in the crimes alleged; and the plea is demur-

able if such allegation of the main fact is so made that it must be taken as a matter of inference. (Gunter v. State, 17.)

FRAUD.

1. FRAUD — FALSE REPRESENTATIONS — MATTERS OF OPINION.—Statements made by an owner to induce another to purchase mining stock, to the effect that the mine was rich in silver, would pay a dividend of from twenty to one hundred per cent, and that there was enough ore on the dump to pay the par value of the stock, are matters of opinion, and, though false, do not constitute fraud. (Crocker v. Manley, 196.)

2. FRAUD.—FALSE REPRESENTATIONS TO CONSTITUTE FRAUD must relate to a material fact, and be made with knowledge of their falsity and with an intent that they shall be acted upon, and they must be acted upon by another, to his injury, under a reasonable belief that they are true. (Crocker v. Manley, 196.)

3. FRAUD—RESCISSIION.—If a purchaser, before making a contract for the purchase of mining stock, personally visits and examines the mine, he cannot rescind his contract of purchase on the ground of false representations made by the vendor as to the value of the mine. (Crocker v. Manley, 196.)

4. EVIDENCE OF FRAUD OR MISTAKE—BURDEN OF PROOF.—A party having the burden of proof to show fraud or mistake must show it by a preponderance of the evidence, but he is not required to "establish it beyond any doubt." (Baltimore etc. Ry. Co. v. Scholes, 307.)

See Equity, 4; Estoppel, 1; Evidence, 2; Lis Pendens, 4.

FRAUDULENT CONVEYANCES.

See Marriage and Divorce, 2, 4.

GARNISHMENT.

See Attachment.

GAS MINES.

See Landlord and Tenant, 5.

GOODWILL.

GOODWILL—WHAT IS SUBJECT OF SALE.—One who, by his skill and industry, builds up a business, acquires a property, at least in the goodwill of his patrons, which is the product of his own efforts; and his right of competition, to the full extent of the field from which he derives his profit, and for a reasonable length of time, is a subject of sale. (Kramer v. Old, 650.)

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—DISCHARGE OF GUARDIAN. WHAT IS.—Within the meaning of a statute of limitations providing that no action can be maintained on any bond given by a guardian, unless commenced within three years from his discharge or removal, the death of the ward must be treated as the discharge of the guardian, and therefore an action against the latter's sureties must be commenced within three years after such death. (Berkin v. Marsh, 505.)

2. GUARDIAN AND WARD — MISAPPROPRIATION OF TRUST FUNDS—ESTOPPEL AGAINST WARD—LIABILITY OF SURETIES.—If, when a ward attains majority, his guardian, on his final accounting as such, and on the petition of the ward, is appoint-

ed trustee of the fund held as guardian, and receipts for it as trustee, and such proceedings are ratified by the ward, who afterward, as cestui que trust, receipts for money received from such trustee as trustee, the cestui que trust is estopped, as against the sureties on the guardian's bond, from claiming that he did not transfer the trust fund to himself as trustee, especially if, at the time of his final settlement as guardian, he was possessed of property out of which, by proper diligence, he could have transferred the trust funds to himself as trustee. (State v. Branch, 533.)

3. GUARDIAN AND WARD — MISAPPROPRIATION OF FUNDS—LIABILITY OF SURETIES.—The use by a guardian in his private business of the funds of his ward is a misapplication thereof, creating a breach of his bond for which his sureties are liable; and if, when the ward becomes of age, such guardian is appointed trustee of the funds held as guardian and gives a receipt therefor, the fact of his solvency at that time does not relieve his sureties as guardian from liability, unless the ward's money was then actually on hand, or the amount was actually thereafter withdrawn from his business, and taken in charge in his capacity as trustee. (State v. Branch, 533.)

4. GUARDIAN AND WARD—MISAPPLICATION OF FUNDS—LIABILITY OF SURETIES.—If, upon a ward attaining majority, his guardian is appointed trustee of the ward's funds then in his hands, the neglect on the part of the guardian to take into his hands, as trustee, the trust funds creates a liability on the part of his sureties on his bond as trustee for losses thereby incurred, but does not relieve his sureties as guardian from liability for misapplication of funds while he was guardian. (State v. Branch, 533.)

5. GUARDIAN AD LITEM — APPOINTMENT DURING A TRIAL.—If it appears on the trial of an action brought by a minor by his guardian ad litem that the appointment of such guardian was irregular and void, the court may then and there permit another petition to be filed, and make another order appointing such guardian, and the trial may then proceed. (Foley v. California Horseshoe Co., 87.)

See Judgment, 3.

HOMESTEAD.

1. HOMESTEAD, EXEMPTION OF AGAINST STATE, FROM EXECUTION.—A homestead is not liable to execution on a judgment for the expenses of keeping the debtor's wife in one of the lunatic asylums of the commonwealth. (Central Kentucky Lunatic Asylum v. Craven, 323.)

2. HOMESTEAD—ABANDONMENT.—If a man's wife is adjudged a lunatic while the family is occupying and claiming property as a homestead, the fact that the husband, after the confinement of his wife in the asylum, slept at his father's house part of the time, and took his meals there all the time, is not an act of abandonment of the homestead. (Central Kentucky Lunatic Asylum v. Craven, 323.)

3. HOMESTEAD—HUSBAND'S CONVEYANCE OF RIGHT OF WAY OVER, IS VOID, UNLESS WIFE JOINS.—A husband cannot, without the consent of his wife, grant or alienate a right of way for a railroad across land owned by him and occupied as a homestead by his family. Such a conveyance, made by him, without her consent, by an instrument in writing, in which she does not join, is a nullity and works no estoppel against the husband. (McGhee v. Wilson, 72.)

HUSBAND AND WIFE.

1. FRAUDULENT TRANSFER BY HUSBAND BEFORE MARRIAGE.--If a man, after an agreement to marry a woman and their assumption of the relations of husband and wife, voluntarily transfers his property to defeat her rights, and subsequently marries and deserts her, she, in a suit against him for maintenance, is entitled to have such transfer declared fraudulent and void as against her. (*Murray v. Murry*, 97.)

2. FRAUDULENT TRANSFERS BY HUSBAND, ATTACK UPON BY WIFE.--A wife entitled to maintain a suit against her husband for maintenance may, as an incident thereto, attack and have declared void as against her a transfer of his property made by him for the purpose of defeating her right to maintenance. (*Murray v. Murray*, 97.)

3. EQUITY--CANCELLATION OF DEED--ACTION BY WIFE. If the lands of both husband and wife, mortgaged to secure his debt, have been sold and conveyed without authority of law, she alone may, without joining him, maintain an action to cancel the deed, both as to her own land and his. (*Shew v. Call*, 678.)

4. MORTGAGE BY HUSBAND AND WIFE--MARSHALING SECURITIES.--If a married woman executes jointly with her husband a mortgage on land, owned in part by him and in part by her, to secure his debt, the husband's land should be first made liable and first sold, in exoneration of the wife's land. (*Shew v. Call*, 678.)

5. AGENCY--HUSBAND AND WIFE.--If a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the repair of buildings upon her land, she cannot repudiate that particular act performed for her benefit within the scope of that authority or management, simply on the ground that, in that instance, the act of her agent was not in harmony with her private opinion or wishes, especially when her objections are not made known to the party furnishing the lumber. (*Maxcy Mfg. Co. v. Burnham*, 436.)

6. AGENCY--HUSBAND AND WIFE.--If a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the erection or repair of buildings upon her land, a jury is justified in finding that the husband acted as the agent of his wife. (*Maxcy Mfg. Co. v. Burnham*, 436.)

7. AGENCY--HUSBAND AND WIFE.--A wife is liable for material which goes into her dwelling-house, when such material is sold and delivered to the husband upon his credit under the belief that he is the owner of the house, and it subsequently appears that he was acting merely as the agent of his wife. (*Maxcy Mfg. Co. v. Burnham*, 436.)

8. HUSBAND AND WIFE--ACTION FOR LOSS OF WIFE'S SERVICES AND COMPANIONSHIP.--One who injures another, either in his rights, property, or reputation, is liable in damages to the extent of that injury. Hence, as a husband is entitled to the services and companionship of his wife, one who willfully joins with her in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. (*Holleman v. Harward*, 672.)

9. HUSBAND AND WIFE--ACTION FOR INJURY TO HIM CAUSED BY SELLING LAUDANUM TO HER.--If a druggist persistently sells opium in the form of laudanum, in large quantities, to a man's wife, without heed to the warnings and protests of her husband, who is trying to break up her habit of using the drug, which habit is just being formed, knowing that she uses it as a beverage to the great injury of her health, and the serious impairment of her

mental faculties, thus causing a loss to the husband of her companionship and services, the wrongdoer is liable to the husband, in damages, for the injuries so sustained. (*Holleman v. Harward*, 672.)

See Cotenancy, 1; Homestead, 3; Receivers, 2.

IDEM SONANS.

See Taxes, 11.

IGNORANCE.

See Limitations of Actions, 6.

INDICTMENT.

INDICTMENT — AMENDMENT — SUBSEQUENT PLEA.—

If an indictment is amended in open court, at the instance of defendant, and with his consent, and he subsequently pleads thereto and goes to trial without objection until after verdict, this action binds him, and it would be a fraud on the court if it did not. (*State v. Cody* 662.)

INDORSEMENT.

See Evidence, 4.

INFANTS.

1. INFANTS—RATIFICATION OF MORTGAGE CONTRACT BY RETENTION OF LAND.—If an infant borrows a large sum of money, and gives a mortgage on land as security, and uses a part of the money, as provided in the application for the loan, to pay off the purchase price of a part of the land, which was an encumbrance or lien thereon, such land will be treated as the specific consideration received by the infant for the mortgage contract to the extent of the amount advanced for the purpose of paying off such lien; and the retention of the land by the infant, after attaining majority, using, claiming, and enjoying it, for nearly two years after minority has ceased, constitutes not only a ratification of the purchase of a part of the land, but an entire ratification of the mortgage contract, rendering it a binding obligation for the whole amount of the mortgage debt. (*American etc. Mortgage Co. v. Dykes*, 38.)

2. INFANTS—CONTRACTS—RATIFICATION BY MARRIED WOMAN.—As a married woman has a constitutional right to purchase property, she may ratify a purchase previously made. Hence, if she, though married, makes a purchase of land during her infancy, the fact of her coverture does not affect a ratification made by her after her minority ceases. (*American etc. Mortgage Co. v. Dykes*, 38.)

3. INFANTS — CONTRACTS — RATIFICATION OR DISAFFIRMANCE—ENTIRETY OF CONTRACT.—The contract of an infant must be avoided or affirmed as an entirety. There is no such thing as a partial ratification of such a contract; and, if the infant, upon attaining his majority, has effectually ratified it in part, such ratification will be treated as imparting validity and binding efficacy to the entire contract and to all its terms. (*American etc. Mortgage Co. v. Dykes*, 38.)

4. INFANTS — CONTRACTS — RATIFICATION — ACTS AMOUNTING TO.—An infant may ratify his contract either by express promise, or by such affirmative acts as selling, mortgaging, or converting to his own use, after attaining majority, the property purchased or procured, or by paying the interest on the debt contracted. A retention and enjoyment, after attaining majority, of the property purchased, as owner will, also, in the absence of dis-

sent, within a reasonable time, operate as a complete ratification. (American etc. Mortgage Co. v. Dykes, 38.)

5. INFANTS—CONTRACTS—RATIFICATION BY ACQUIESCENCE.—If an infant, after reaching majority, still retains what he received by virtue of his contract made during minority, or a substantial portion thereof, or the proceeds thereof, time becomes an important element, and he must, within a reasonable time, under all the circumstances, give notice, in an appropriate manner, of his election to disaffirm his contract. If he does not do so, but retains the thing received, using and enjoying it as owner, his conduct will be a ratification by acquiescence. (American etc. Mortgage Co. v. Dykes, 38.)

6. INFANTS — CONTRACTS — RATIFICATION—SILENT ACQUIESCENCE.—If an infant has parted with property, or has used or consumed, during minority, all of the consideration received by him, under a contract made by him during his minority, delay in making his election will neither benefit him nor injure others, because he retains nothing and need restore nothing. Hence, under the circumstances, silent acquiescence, unconnected with affirmative acts, for any period short of the statutory bar, when there is room for the operation of the statute, does not amount to a ratification. (American etc. Mortgage Co. v. Dykes, 38.)

7. INFANTS — CONTRACTS—AVOIDANCE OF—REQUIRING ACCOUNT OF CONSIDERATION.—If an infant, upon arriving at the age of majority, seeks relief in equity from his contract, or sues at law to recover what he parted with, or interposes his disability as a defense to an action at law or in equity, he may be required, on demand or suit, to account for so much of the consideration as he retains and holds at the time he reaches the age of twenty-one. (American etc. Mortgage Co. v. Dykes, 38.)

8. INFANTS — CONTRACTS — AVOIDANCE OF, NECESSITY OF RESTORING CONSIDERATION.—If an infant, upon reaching his majority, yet retains what he received by virtue of his contract, or any substantial portion thereof, or the proceeds thereof, he cannot disaffirm or repudiate his contract without restoring or abandoning to the use of the other party that which remains in his possession of the consideration received. (American etc. Mortgage Co. v. Dykes, 38.)

9. INFANTS — CONTRACTS — AVOIDANCE OF, WITHOUT RESTORING CONSIDERATION.—An infant, upon arriving at majority, may avoid his contract, though he has, during minority, wasted or consumed the consideration received for it. (American etc. Mortgage Co. v. Dykes, 38.)

10. INFANTS — CONTRACTS — RATIFICATION OR DISAFFIRMANCE.—The contract of an infant, whether executed or executory, being merely voidable and not void, may, upon his arriving at majority, be repudiated by him, or may be ratified and confirmed, without any new consideration, when his minority ceases. (American etc. Mortgage Co. v. Dykes, 38.)

11. INFANTS — CONTRACTS — RATIFICATION—PLAINTIFF MUST PLEAD ACTS OF.—If infancy is pleaded as a defense to a bill to foreclose a mortgage, which merely alleges the execution of the mortgage, and the default, the complainant is not entitled to a decree on the ground of ratification, unless he amends his bill, and pleads the facts constituting the ratification relied on to avoid such defense. (American etc. Mortgage Co. v. Dykes, 38.)

12. INFANTS—RATIFICATION OF SEPARATE CONTRACTS. If an infant borrows money, an agreement to pay a loan company a

commission for securing the loan is not ratified, after the infant attains majority, by a ratification of the contract made with the lender, at a different time, as the two are separate and distinct contracts. (American etc. Mortgage Co. v. Dykes, 38.)

See Parent and Child.

INJUNCTIONS.

1. AN INJUNCTION AGAINST THE USE OF A STREET BY AN ELEVATED RAILWAY will not be granted at the instance of an owner of abutting property, though consent to such use has not been properly granted by the municipal authorities. If the injury done to the complainant is capable of being estimated in money, and is recoverable by an action at law, he must resort to that remedy. In such an action, a single recovery can be had for the whole damages, present and future. (Doane v. Lake Street etc. Ry. Co., 265.)

2. AN INJUNCTION IN FAVOR OF A PROPERTY OWNER AGAINST THE ADDITIONAL USE OF A STREET for an elevated street railway will not be issued where the right to construct such railway has been granted by a city. If a property owner has any remedy, it is only by an action at law to recover damages. (Doane v. Lake Street etc. Ry. Co., 265.)

3. INJUNCTION—CONTRACT IN PARTIAL RESTRAINT OF TRADE—WHO WILL BE PROHIBITED—CORPORATIONS.—If several persons engaged in business, at a certain place, sell it, and agree not to engage in the same business, at that place, but subsequently join with other persons in forming a corporation to engage in such business, at the place named, it is only the prohibited parties to the original contract who will be enjoined from engaging in, or from taking stock in, or assisting in, the organization of such corporation. (Kramer v. Old, 650.)

4. INJUNCTION—CONTRACT IN PARTIAL RESTRAINT OF TRADE — RETAINING CONSIDERATION — CORPORATIONS.—If the owners of a business sell it, and have presumably received its full value, and which business is protected by their own agreement against their own competition, equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals. (Kramer v. Old, 650.)

INSANE PERSONS.

1. INSANE PERSONS—NEGOTIABLE INSTRUMENTS.—The purchaser of a negotiable instrument executed by an insane person is chargeable with knowledge of his insanity, and stands in no better a position than the original payee who took the paper with knowledge of the incapacity of the maker. (Hosler v. Beard, 720.)

2. INSANE PERSON, CONSIDERATION FOR CONTRACT OF —PRESUMPTION.—No matter what is the form of the contract of an insane person, it cannot impose on him the burden of proving want of consideration. (Hosler v. Beard, 720.)

3. INSANITY, BURDEN OF PROVING.—Plaintiff suing upon a negotiable instrument or other contract made by an insane person must assume the burden of proving that it was given for necessities, or during a lucid interval, or while the insane person was apparently of sound mind and not known to be otherwise, and for property purchased by him under a fair and bona fide contract, and which he has received and fully enjoyed, so that the parties can no longer be put in statu quo. (Hosler v. Beard, 720.)

4. INSANITY IS USUALLY A BAR TO AN ACTION upon an executory contract if existing when it was entered into. (Hosler v. Beard, 720.)

5. LUNATICS.—IF A NEGOTIABLE INSTRUMENT is indorsed by a person while sane, and, upon its falling due and after he had become insane, he indorses another note given in renewal, the first note thereupon being surrendered and canceled, he is liable upon the second indorsement, if the payee of the note has no notice of the infirmity of the indorser. (*Bank v. Sneed*, 788.)

6. LUNATICS.—A CONTRACT of a lunatic will not be set aside where it is entered into in good faith, without fraud or imposition, for a valuable consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original position. (*Bank v. Sneed*, 788.)

See Marriage and Divorce, 8.

INSOLVENCY.

1. INSOLVENCY—EQUITY.—In the allowance of debts and claims in bankruptcy and insolvency, the court proceeds upon principles that are equitable in their character. (*In re Brockway Mfg. Co.*, 401.)

2. JUDGMENTS PENDING INSOLVENCY PROCEEDINGS. If, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment so far as to defeat any claim for an allowance under it against the insolvent estate; and the judgment is not provable against the estate of the debtor because it did not exist at the time of the initiation of the insolvency proceedings. (*Emery, Appellant*, 440.)

See Banks, 11.

INSTRUCTIONS.

1. JURY TRIAL.—INSTRUCTIONS to a jury, on the trial of an action by a minor employé to recover for injuries alleged to have been received from the sudden starting of a machine, and which speak of dangerous machinery, are not erroneous as assuming the fact that the machine which inflicted the injury was dangerous, if it was of a class which, according to common knowledge, must be dangerous while in motion. (*Foley v. California Horseshoe Co.*, 87.)

2. JURY TRIAL, HARMLESS ERROR IN INSTRUCTIONS.—An instruction stating the law too strongly as against the defendant does not entitle him to a reversal, if, under no proper instruction, judgment could have been given in his favor. (*Lake v. Hancock*, 159.)

3. INSTRUCTIONS.—REQUESTS for improper, argumentative, and confusing instructions are properly refused. (*Bracken v. State*, 23.)

4. INSTRUCTION — ASSUMING CREDIBILITY OF EVIDENCE.—A charge which assumes the credibility of evidence is erroneous. Hence, upon the issue as to whether premises, in which a burial was had, had been dedicated, it is erroneous for the court, of its own motion, to instruct the jury that the undisputed evidence shows that, prior to the interment, such premises had been dedicated by the defendant for burial purposes. (*Bessemer Land etc. Co. v. Jenkins*, 26.)

5. INSTRUCTIONS—SINGLING OUT A WITNESS.—A court must not single out a witness, where the testimony is conflicting, and direct the jury to find according to his evidence; but a witness is not "singled" out, in the offensive sense of that word, where the jury is charged that, if they believe he told the truth, and that a fact is as testified to by him, they should find for the plaintiff; but, if they do not believe so, and do believe that the facts are as testified to by other witnesses, that they should then find for the defendant; and such instruction is not erroneous. (*Harris v. Murphy*, 650.)

6. JURY TRIAL—INSTRUCTIONS SHOULD AVOID ANY STATEMENT OF THE EVIDENCE which may indicate the conclusions of the judge respecting the facts directly disputed on the trial. (McShane v. Kenkle, 572.)

INSURANCE

1. INSURANCE—LIFE—ASSIGNMENT OF.—Although a policy of life insurance provides that it is payable to the "executor or administrator" of the insured, reserving the right to the insurer, at its option, to pay the amount of the insurance to any person appearing to the insurer to be entitled thereto by reason of having incurred expense in the burial of the insured, the policy may be assigned by the latter and the amount thereof recovered by the assignee against the insurer, unless the latter has exercised the option thus reserved. (Prudential Ins. Co. v. Young, 319.)

2. INSURANCE—LIFE—APPLICATION DRAWN BY AGENT—FALSE ANSWERS.—If an application for life insurance is drawn by the agent of the insurer, and the answers to the interrogations contained therein are written by him in filling out the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument. (Marston v. Kennebec etc. Ins. Co., 412.)

3. INSURANCE—LIFE—APPLICATION DRAWN BY AGENT—FALSE ANSWERS.—If an application for life insurance is drawn by the agent of the insurer, and the answers to interrogatories contained therein are written by such agent, without fraud or collusion on the part of the applicant, parol evidence is admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the insurer made with full knowledge of all the facts, and he is estopped from controverting the truth of such statements. (Marston v. Kennebec Ins. Co., 412.)

4. INSURANCE—ANSWERS TO INTERROGATORIES.—An insurer, by receiving an application for life insurance with questions therein contained partially answered and issuing a policy thereon, thereby waives the imperfections in the answers, and renders the omission to answer more fully immaterial. (Marston v. Kennebec Ins. Co., 412.)

5. INSURANCE.—AN APPLICANT FOR LIFE INSURANCE is presumed to answer truthfully all questions contained in the application. (Marston v. Kennebec Ins. Co., 412.)

6. INSURANCE — LIFE — POLICY, WHEN GOVERNED BY STATUTE.—Although a written application for life insurance contains a stipulation that "statements made to an agent not herein written shall form no part of the contract to be issued hereon," such stipulation is inferior to, and must be controlled by, a statutory provision that "such agents and the agents of all domestic companies shall be regarded in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk, and all matters connected therewith. Omissions and misdescriptions known to the agents shall be regarded as known to the company and waived by it as if noted in the policy." Statutes are paramount to contracts or stipulations therein which are in conflict with such statutes. (Marston v. Kennebec Ins. Co., 412.)

7. INSURANCE—LIFE—APPLICATION DRAWN BY AGENT. If an application for life insurance is drawn by an agent, for the insurer, and the answers to interrogatories contained therein are written by him without fraud or collusion on the part of the applicant, parol evidence is admissible to show the actual statements made by

the latter at the time of the filling of the application, although it may contradict the answers as written by the agent. (*Marston v. Kennebec Ins. Co.*, 412.)

8. **INSURANCE—ESTOPPEL.**—If a purchaser of insured property is by the oral agreement of a general agent of the insurer to indorse on the policy the consent to the transfer to such purchaser, and he is thereby prevented from effecting other insurance thereon, the insurer is precluded from claiming a forfeiture of the policy on the ground of the absence of such indorsement, and also from insisting that there was no consideration for the agreement to make the indorsement. (*Marston v. Guardian Assur. Co.*, 600.)

9. **INSURANCE—WAIVER OF WRITTEN INDORSEMENT OF CHANGE IN OWNERSHIP.**—If a conveyance is made of insured property, and notice thereof given to a general agent of the insurer, who thereupon agrees to make on the policy the indorsement necessary to give the grantee the benefit of the insurance, but fails to comply with his agreement, and the property is subsequently destroyed by the peril insured against, the insurer is liable to an action to recover the damages resulting to the purchaser from the failure to make such indorsement. (*Manchester v. Guardian Assur. Co.*, 600.)

10. **INSURANCE—WAIVER BY APPLICANT OF HIS PRIVILEGE TO HAVE HIS PHYSICIAN NOT TESTIFY.**—If in an application for life insurance, the applicant declares that he waives any and all provisions of law preventing any physician from disclosing any information acquired while attending the applicant in a professional capacity, or rendering him incompetent as a witness, and consents that such physician may testify concerning the applicant's health and physical condition, past, present, or future, such waiver is valid, and entitles the insurer in an action upon a policy issued upon such application to call and examine a physician as a witness and to have him answer a question which, but for such waiver, must be regarded as a privileged communication which he was not at liberty to disclose. (*Foley v. Royal Arcanum*, 621.)

11. **INSURANCE, LIFE—STATEMENTS, TRUTH OF, WHEN GUARANTEED.**—If, in an application for life insurance, the applicant purports to warrant the truthfulness of statements therein, and a certificate issued to him purports to be upon condition that the statements made in such application are a part of the contract, such statements become a part of such contract, and, if knowingly false, avoid it. (*Foley v. Royal Arcanum*, 621.)

12. **INSURANCE, FIDELITY—WHEN COMPLAINT STATES CAUSE OF ACTION.**—A complaint by a guaranty insurance company, against an elevator company's employé, to recover money alleged to have been paid to the elevator company on a bond, by which the plaintiff obligated itself to make good, and to reimburse, the elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant, states a cause of action, where it alleges a request for a bond on the part of defendant; the furnishing of such a bond to the employer and his acceptance thereof; a promise, either express or implied, to reimburse plaintiff on account of losses incurred by reason of such bond; a breach of the conditions of the bond; a claim upon plaintiff for payment of such loss under the bond; the payment by plaintiff to the employer of the loss occasioned by breach of the provisions of the bond, and the failure of the agent to reimburse the plaintiff for the amount so paid to the employer after demand so to do. (*Fidelity etc. Co. v. Eickhoff*, 464.)

13. **INSURANCE, FIDELITY—RESPECTIVE OBLIGATIONS—EFFECT OF PROVISIONS AS TO PROOF OF LIABILITY.**—A

contract of guaranty having been executed at the request of an employé, in the form requested by him, and whereby a guaranty insurance company insures his employer against the employé's acts of fraud or dishonesty, the employé's obligation to indemnify the company is coextensive with that of the company to reimburse the employer; and any provisions in the contract, as to proof of liability, binding on the insurance company, in favor of the employee, are equally binding on the employé in an action brought by the insurance company against him to recover indemnity for what it has paid in his behalf. (*Fidelity etc. Co. v. Eickhoff*, 464.)

14. **INSURANCE, FIDELITY—PLEADING.**—If a guaranty insurance company is bound, by its contract, to make good, and to reimburse, an elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of an employé of the elevator company, an express and direct allegation, in a complaint of the insurance company against the employé to recover upon the latter's promise of indemnity, that the shortage was so caused is unnecessary where the facts alleged prove that, under the contract, the shortage was caused by the defendant's fraud or dishonesty. (*Fidelity etc. Co. v. Eickhoff*, 464.)

15. **INSURANCE, FIDELITY — PUBLIC POLICY.**—A contract guaranteeing the honesty of employés is not void as being against public policy. (*Fidelity etc. Co. v. Eickhoff*, 464.)

16. **EVIDENCE—STIPULATIONS AS TO CONCLUSIVENESS OF—PUBLIC POLICY.**—A stipulation in a contract between a guaranty insurance company and an employé of another, guaranteeing the honesty of the employé, that the voucher or other evidence of payment by the company to the employer shall be conclusive evidence as to the fact and extent of the employé's liability, is void as against public policy. (*Fidelity etc. Co. v. Eickhoff*, 464.)

17. **CORPORATIONS, FOREIGN—COMPLIANCE WITH OUR LAWS—PRESUMPTION.**—In an action by a foreign corporation, termed a "guaranty insurance company," engaged in the business of guaranteeing to employers the fidelity of their employés, it will not be presumed that the company has not complied with the laws of this state, though the complaint fails to allege that the plaintiff has a license to do an insurance business in this state. That is a matter of defense. (*Fidelity etc. Co. v. Eickhoff*, 464.)

18. **INSURANCE—WAIVER OF NOTICE OF LOSS AFTER POLICY IS DEAD.**—If proofs of loss are transmitted to the general managers of an insurance company, after the policy is dead, because of a failure to give "immediate" notice of loss, as therein required, the company's denial of any liability under the policy, though it retains the proofs of loss, is not a waiver of a failure to give notice of loss. (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

19. **INSURANCE—AUTHORITY OF AGENTS—ACCEPTANCE OR WAIVER OF NOTICE OF LOSS.**—Authority to make a contract of insurance carries with it no implied authority to act in the matter of a loss, under the policy, after it has occurred. Hence, if the expressed authority of agents is simply to accept applications for insurance, and to receive the premiums thereon, to fix the premium or rate of insurance, and to fill up, countersign, and issue policies thereon, which they receive from the company, signed by its president and secretary, they have no authority, express or implied, to accept or waive notice of loss. (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

20. **INSURANCE—BREACH OF CONDITION TO GIVE "IMMEDIATE" NOTICE OF LOSS.**—A failure, for nearly sixty days after a fire, to give notice of loss, is, as a matter of law, a breach

of a condition of the policy requiring the insured to give "immediate" notice of loss. (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

21. **INSURANCE—NOTICE OF LOSS AS CONDITION PRECEDENT.**—If a policy of insurance requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to a right of action on the policy. (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

22. **INSURANCE—MEANING OF "DIRECT" LOSS.**—The word "direct," in a policy insuring a building "against all direct loss or damage by fire," means merely "immediate," or "proximate," as distinguished from "remote." (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

23. **INSURANCE—LOSS BY FIRE INCLUDES WHAT.**—If a building is insured "against all direct loss or damage by fire," under a policy providing that, if the building falls, "except as a result of fire," the insurance shall immediately cease, and a building, adjacent to the one insured, catches fire, and, being partially consumed, falls, as a direct result of the fire, carrying down with it not only the partition wall between the buildings but also a part of the insured building, the fall of the latter is the "result of fire," and a "direct loss or damage by fire," although no part of it ignited or was consumed by fire. (*Ermentrout v. Girard etc. Ins. Co.*, 481.)

24. **INSURANCE—FIRE AS PROXIMATE CAUSE OF LOSS.**—To render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property should be actually ignited or consumed by fire. (*Ermentrout v. Girard Ins. Co.*, 481.)

See Attachment, 11.

INTEREST.

INTEREST—RULE FOR COMPUTING—PARTIAL PAYMENTS.—The United States rule is adopted in Minnesota as the law for computing interest. Hence, when partial payments have been made, the rule for casting interest is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance. (*Betcher v. Hodgman*, 447.)

INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE—POWER OF STATES.**—While a state cannot interfere with transportation into or through its territory, beyond what is absolutely necessary for its self-protection, it is authorized, in the exercise of the police power, to provide for maintaining domestic order, and for protecting the health, morals, and security of its people. (*State v. Southern Ry. Co.*, 689.)

2. **INTERSTATE COMMERCE—POWER OF CONGRESS.**—While Congress has power, by express enactment, to supersede all conflicting legislation upon the subject of interstate commerce, yet, until its powers are asserted, a state has the right to pass laws necessary to preserve the health and morals of its people, though their enforcement may involve some slight delay or disturbance of the transportation of goods or persons through its borders. (*State v. Southern Ry. Co.*, 689.)

See Sunday, 1.

JOINT LIABILITY.

1. **JOINT LIABILITY—NEGLIGENCE—CONTACT OF TROLLEY AND TELEPHONE WIRES.**—If an electric street railroad company and a telephone company concurrently maintain two wires, so related to each other, and so erected, that one is likely to fall across the other, and occasion damage to animal life or property, it is the common duty of both companies to abate the dangerous condition, where the danger is within the concurrent, common knowledge of both parties, and they are jointly liable for injuries occasioned by a contact of the wires, especially where they allow them to remain in that condition. (*McKay v. Southern Bell Teleph. Co.*, 59.)

2. **JOINT LIABILITY—PRESUMPTION.**—There should be no presumption indulged in in favor of an obligation being joint instead of joint and several. (*Schultz v. Howard*, 470.)

See Railroads, 17.

JUDGMENTS.

1. **A JUDGMENT IN EJECTMENT** in an action for a tract of land, including that sued for in a second action between the same parties, the plaintiff having recovered judgment in the former action, but not for the tract of land embraced in the second, is not conclusive against him in such second action. It merely shows that, for some reason not disclosed, the land embraced in the second action was omitted from the former judgment. (*Lake v. Hancock*, 159.)

2. **A JUDGMENT CONCLUDES THE PARTIES ONLY** as to the ground covered thereby and the facts necessary to uphold it. (*Lake v. Hancock*, 159.)

3. **JUDGMENTS—RES JUDICATA — GUARDIAN—TRUSTEE.** A judgment on an application for the removal of a trustee that he has received funds as trustee from himself as guardian, is not res judicata in an action on his bond as guardian for misappropriation of such trust funds. (*State v. Branch*, 533.)

4. **JUDGMENTS — RES JUDICATA — PARTIES BOUND. — A** party sought to be bound by a former judgment must have been a party to both actions, and he must have been a party to both in the same capacity of character. (*State v. Branch*, 533.)

5. **JUDGMENTS—RES JUDICATA—PARTIES CONCLUDED.** Only parties to a former judgment and those in privity with them are concluded thereby, but they may be bound thereby in a subsequent proceeding to which they are parties and which involves the identical issue, though the adversary parties are not the same. (*State v. Branch*, 533.)

6. **JUDGMENTS—CONCLUSIVENESS OF—ESTOPPEL.**—The conclusiveness of a judgment, as between the parties to it is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided. (*State v. Branch*, 533.)

7. **A JUDGMENT BY DEFAULT IN SUMMARY PROCEEDINGS BY A LANDLORD** for the nonpayment of rent is conclusive between the parties of the existence and validity of the lease, the occupation by the tenant, that the rent was due, and also of every other fact stated in the complaint, and required to be alleged as a basis of the proceedings. (*Reich v. Cochran*, 607.)

8. **RES JUDICATA.—A JUDGMENT IN FAVOR OF A LANDLORD AGAINST A TENANT**, though by default, for the recovery of the possession of the premises, on the ground that there was a certain amount of rent due and unpaid, followed by the payment by defendant of such sum, is conclusive against him that there was a

valid lease to him from the plaintiff of the premises described in the complaint, and estops the defendant from maintaining an action to have it adjudged that the lease to him was in fact intended as a mortgage, and was usurious, and that it should be delivered up and canceled upon the ground of such usury. (*Reich v. Cochran*, 607.)

9. RES JUDICATA.—IF SEVERAL ISSUES ARE PRESENTED BY THE PLEADINGS, and the record fails to show upon which in fact the judgment was rendered, it is competent to show that fact by evidence allunde, not to contradict the record, but in support of it. (*Embden v. Lisherness*, 442.)

10. JUDGMENTS AS ESTOPPEL.—A PARTY ACTING IN ONE RIGHT can neither be benefited nor injured by a judgment for or against him when acting in some other right. (*Morrison v. Clark*, 395.)

11. JUDGMENTS—RES JUDICATA.—The essential elements of res judicata are the identity of the parties and of the issue necessarily involved. It must also appear that the issue which terminated in the former judgment was between the same parties in the same right or capacity, or their privies claiming under them. (*Morrison v. Clark*, 395.)

12. JUDGMENTS—RES JUDICATA—EVIDENCE.—If the same evidence will sustain both the present and a former action between the same parties, the judgment in such action is a bar to a subsequent suit. (*Morrison v. Clark*, 395.)

13. JUDGMENTS—RES JUDICATA—EASEMENTS—COTENANCY.—In an action of trespass against a husband, who with his wife were cotenants of a right of way on the land on which the alleged trespass was committed, he sought to justify the trespass on the ground that it was committed by license and authority of his wife in the exercise of her right to have a reasonably suitable and convenient way across the land, and it was held that a former judgment against him for trespasses committed on the same side of the land, based on his personal agreement to use a way on the other side of the land was not conclusive against him and his defense to the latter action, and that in such action the wife was entitled to have the reasonableness of the location of the right of way determined by a jury, and, as the husband was not acting in the exercise of his own right, but solely on the authority of his wife, the question of the reasonableness of the location of such way was open to him as a defense. (*Morrison v. Clark*, 395.)

14. A JUDGMENT IS AS AGAINST OTHER CREDITORS OF THE DEFENDANT, CONCLUSIVE of the justness and the amount of the debt, and cannot, in a bill to enforce the lien against real property, be impeached, except for fraud and collusion. (*First Nat. Bank v. Huntington Distilling Co.*, 878.)

15. THE LIEN OF A JUDGMENT RELATES to the first day of the term at which it was rendered, if it might have been rendered at that date, and takes precedence over other judgments which could not have been rendered until after such day, irrespective of the dates on which such judgments were in fact rendered. (*First Nat. Bank v. Huntington Distilling Co.*, 878.)

See Corporations, 45; Cotenancy, 3; Estoppel, 23; Evidence, 8; Insolvency, 2.

JUDICIAL SALES.

1. STATUTORY POWERS OF SALE GIVEN TO AN OFFICER must be strictly observed to confer title. (*Shew v. Call*, 678.)

2. JUDICIAL SALE — PURCHASER, WHEN NOT LIABLE FOR LOSS AT RESALE.—If, after a judicial sale, the parties agree

that the property may be resold, the sale not having been reported to, nor confirmed by, the court, and upon the resale it is purchased by the purchaser at the first sale, he is not liable for the difference between the amount realized at the first and second sales. (*Stout v. Philippi Mfg. Co.*, 843.)

3. JUDICIAL SALE.—BEFORE DIRECTING A RESALE FOR THE PURPOSE OF CHARGING THE PURCHASER, there ought to be a report and confirmation of the sale and a rule upon him to comply with its terms, or to show cause why the property should not be resold and he held responsible for the difference between the sum at which he agreed to buy and what the property may bring at a resale. (*Stout v. Philippi Mfg. Co.*, 843.)

4. JUDICIAL SALE, HOW ENFORCED.—If a judicial sale is reported to, and confirmed by, the court, the purchaser may be compelled to comply with its terms, and the order of the court for such compliance may be enforced by attachment and commitment after an order of the court made directing a resale, with a provision that the purchaser shall be held responsible in case it brings less than his bid. (*Stout v. Philippi Mfg. Co.*, 843.)

5. A PURCHASER OF PROPERTY AT A JUDICIAL SALE is not liable if it is not reported to the court, and the officer making the sale ignores it and proceeds to make another. (*Stout v. Philippi Mfg. Co.*, 843.)

6. A PURCHASER OF PROPERTY AT A JUDICIAL SALE INCURS A LIABILITY for the price he agrees to pay, provided proper steps are taken to enforce it. (*Stout v. Philippi Mfg. Co.*, 843.)

JURISDICTION.

See Courts; Executors and Administrators.

JURY TRIAL.

See Instructions; Trial.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—MARRIED WOMAN AS PRIVY IN ESTATE OR TENANT.—A married woman's mere possession of land with her husband, who is the grantee's tenant, and who is in possession after the death of such grantee, the land being afterward owned by the grantee's devisee, does not make her a privity in estate under her husband, or a tenant of the devisee. (*Shew v. Call*, 678.)

2. DEFINITIONS.—“PRIVY,” in the law of landlord and tenant, means a privity in estate; a property right acquired from the lessee by contract or inheritance. (*Shew v. Call*, 678.)

3. LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE, BASIS OF.—Tenancy is the result of a contract between the landlord and the tenant by which the latter admits the lessor's title, and he and his privies are estopped, while continuing in possession, to dispute such title; but it is the contract, followed by possession, that creates the estoppel; possession without the contract will not. (*Shew v. Call*, 678.)

4. A LIFE TENANT may lawfully mine, sever, and convert the mineral from land into personalty, if the mines were open when the tenancy for life was created. (*Koen v. Bartlett*, 884.)

5. CONVEYANCE—OIL AND GAS MINES, RESERVATION OF RIGHT TO.—If the owner of real property who has executed a lease authorizing another to mine and operate for oil and gas for a term of years and as much longer as the premises may be operated

therefor, at a royalty of one-eighth the product, subsequently conveys such premises to his children, subject to such lease, and reserving to himself the full control of the land in all respects and for all purposes during his life, his royalty does not, during his life, pass to the grantees under such conveyance. (*Koen v. Bartlett*, 884.)

See Judgment, 7, 8.

LEASE.

See Landlord and Tenant.

LEGISLATURE.

See Officers, 8.

LETTERS-PATENT.

See Patents.

LIBEL.

1. LIBEL—PUBLIC OFFICE, CANDIDATE FOR.—If a person is a candidate for appointment to a public office at the hands of the governor, one who writes to him that it is a notorious fact that the candidate runs the only house of prostitution in the town, and his mistress has been indicted in the courts, is not subject to an action for libel, unless his statements were both false and malicious. The publication is qualifiedly privileged. Though the matter published was not true, yet if there was reasonable ground to believe it true, and it was published in good faith, for the public good, without any private personal malice, the publisher is not liable to damages therefor. (*Coogler v. Rhodes*, 170.)

2. LIBEL — QUALIFIEDLY PRIVILEGED COMMUNICATION.—Communications to the appointing power with reference to the character and qualifications of a candidate for appointment to a public office are qualifiedly or conditionally privileged. No action will lie therefor unless they are both false and malicious; and the burden of showing them so is upon the plaintiff. (*Coogler v. Rhodes*, 170.)

3. LIBEL—MALICE.—That which would otherwise be a qualifiedly privileged publication is not so if the publisher was actuated by malice. (*Coogler v. Rhodes*, 170.)

4. LIBEL—CONDITIONALLY PRIVILEGED PUBLICATION—BURDEN OF PROOF RESPECTING MALICE.—If a publication is qualifiedly privileged, malice cannot be presumed from the mere use of libelous language, and the plaintiff, in an action to recover for such libel, must affirmatively show malice in the publisher. Such malice may be inferred from the language itself, or proved by extrinsic circumstances, but is not inferable from the mere fact that the statements are untrue. (*Coogler v. Rhodes*, 170.)

5. LIBEL. — A PUBLICATION IS CONDITIONALLY OR QUALIFIEDLY PRIVILEGED where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to a certain other person to whom he makes such communication in bona fide performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he bona fide and without malice proceeds to tell. (*Coogler v. Rhodes*, 170.)

6. LIBEL.—PRIVILEGED COMMUNICATIONS ARE DIVIDED INTO TWO CLASSES, absolutely privileged and conditionally or qualifiedly privileged. (*Coogler v. Rhodes*, 170.)

7. EVIDENCE—LIBEL.—Where the libel charged by the plaintiff was the accusing him of keeping a house of prostitution, bonds given by him as a surety on behalf of public prostitutes for their appearance in proceedings against them for the keeping of a disorderly house should be received in evidence, at least for the purpose of mitigating damages. (*Coogler v. Rhodes*, 170.)

8. EVIDENCE IN AN ACTION FOR LIBEL, WHEN MATERIAL.—If, in an action for libel in charging the plaintiff with keeping a house of prostitution, a witness for the defense, in response to an inquiry as to whether he knew of plaintiff's keeping such a house, and if so, when, and for how long, answers that he does not know positively, but that it was generally supposed that the plaintiff was concerned in the management of such a house, this answer is admissible as tending to show good ground for suspicion of the truth of the matters charged, and therefore tends to mitigate damages, and to aid the jury in determining whether the alleged libelous language was published through express malice of the defendant or not. (*Coogler v. Rhodes*, 170.)

LICENSE.

1. CONSTITUTIONAL LAW—LICENSES.—The legislature of every state has full power to enact a license law, unless forbidden by the state constitution. (*State v. Camp Sing*, 551.)

2. CONSTITUTIONAL LAW—LICENSE TAXES.—Under a constitution providing that the legislature may levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation of property for taxation, and may also impose a license tax both upon persons and upon corporations doing business in the state, and that it shall not levy taxes upon the inhabitants or property in any county, city, or town for county, town, or municipal purposes, but may by law vest the corporate authorities thereof with power to assess and collect taxes for such purposes, the legislature may authorize the collection of a license from persons doing business, though the object is the obtaining of revenue, a portion of which is to be retained by the counties. (*State v. Camp Sing*, 551.)

LIMITATIONS OF ACTIONS.

1. STATUTE OF LIMITATIONS IN FAVOR OF SURETIES DOES NOT PROTECT PRINCIPALS.—A statute providing that no action may be maintained against sureties on any bond given by a guardian, unless commenced within the time designated therein, does not prevent the commencement and maintenance of an action against the principal after that time. (*Berkin v. Marsh*, 565.)

2. STATUTE OF LIMITATIONS, DISABILITY TO SUE, WHAT IS NOT.—The absence of a perfected cause of action does not constitute a disability to sue. Therefore, if a statute provides that actions upon a guardian's bond must be commenced within three years after a removal or discharge, unless at the time of the discharge the person entitled to sue was under legal disability, the fact that no action could be maintained until the filing of the final report by the guardian and its confirmation by the court does not prevent the running of the statute of limitations. (*Berkin v. Marsh*, 565.)

3. PENALTY, ACTION FOR, WHAT IS.—If, by the statutes of a state, the trustees or directors of a corporation become liable to its creditors for the amount of its debts upon the failure to make an annual report required by such statute, an action to enforce such statute must, within the meaning of the statute of limitations, be deemed an action for a penalty, and must, therefore, be commenced

within the time specified in such statute for commencing actions to recover penalties. (State Sav. Bank v. Johnson, 591.)

4. STATUTE OF LIMITATIONS.—IN AN ACTION BY AN ASSIGNEE of a county order to recover of the assignor the amount paid therefor, on the ground that it was invalid when issued, the right of action accrues immediately upon the assignment, and the statute of limitations runs from that date, though the order was not due by its terms when the assignment was made, and the assignee did not become aware, until long afterward, that it would not be paid. (Merchants' Nat. Bank v. Spates, 828.)

5. STATUTE OF LIMITATIONS.—IGNORANCE on the part of the assignee of non-negotiable paper does not prevent or postpone the running of the statute of limitations against a suit to recover of the assignor the amount paid therefor, on the ground that it was invalid when sold, unless such ignorance was owing to the conduct of the assignor. (Merchants' Nat. Bank v. Spates, 828.)

See Executors and Administrators, 4.

LIS PENDENS.

1. UNRECORDED CONVEYANCES.—LIS PENDENS AFFECTS ONLY PERSONS ACQUIRING SOME INTEREST IN THE PROPERTY AFTER THE FILING OF THE NOTICE OF THE PENDENCY OF THE SUIT. Hence, a person having a conveyance from one of the parties executed before that time is not affected, though such conveyance is not recorded and the plaintiff has no notice of it. (Baker v. Bartlett, 594.)

2. CONVEYANCES—LIS PENDENS.—The filing of a notice of lis pendens is not a conveyance, nor is the person filing it a purchaser, and, as such, protected against pre-existing unrecorded conveyances. (Baker v. Bartlett, 594.)

3. LIS PENDENS GIVES NOTICE ONLY OF THE FACTS CONTAINED IN THE RECORD of the suit to which it relates as it was when the party effected the purchase, and only for the purposes of that suit, and for the benefit of the parties thereto. (Stout v. Philippi Mfg. Co., 843.)

4. LIS PENDENS — PURCHASER, WHEN CHARGEABLE WITH FRAUD.—If the facts in the record tell a pendente lite purchaser that his vendor committed fraud, he becomes a party to that fraud. Hence, if he purchases under a trust deed pending a suit to set it aside for fraud, he becomes a participant in such fraud, so far as the complainants in that suit are concerned. (Stout v. Philippi Mfg. Co., 843.)

5. LIS PENDENS.—PURCHASERS OF REAL PROPERTY WHEN LIABLE FOR RENTS.—Purchasers of real property, pending a suit, are liable for the rents thereof, if their purchase was made for the purpose of hindering, delaying, or defrauding creditors. (Stout v. Philippi Mfg. Co., 843.)

6. LIS PENDENS.—PURCHASERS OF REAL PROPERTY, AFTER THE RECORDING OF A NOTICE of lis pendens are as much bound by the decree as if parties to the suit. (Stout v. Philippi Mfg. Co., 843.)

MAINTENANCE.

See Receivers, 2.

MANDAMUS.

1. MANDAMUS TO CONTROL DISCRETION—ELECTION OF SCHOOL DIRECTOR.—If a board of school directors is guilty of gross abuse of discretion in selecting, for purely partisan purposes,

judges and clerks from the same political party to conduct an election of members of such school board, and arbitrarily refuses to select election officers from different political parties, the supreme court may, by mandamus, compel such board to rescind the selection of election officers so made, and to select them from the different political parties. (State v. Board, 503.)

2. **MANDAMUS TO CONTROL DISCRETION.**—While mandamus does not generally lie to control the discretion of an inferior tribunal in whom a discretion is vested in the performance or non-performance of certain duties devolved upon it by law, yet, if such discretionary power is exercised with manifest injustice, such abuse may be controlled by mandamus. (State v. Board, 503.)

3. **MANDAMUS TO CONTROL DISCRETION.—IF THE FACTS** are undisputed, or stand confessed by the pleadings, and it appears to the court having superintending jurisdiction over an inferior court, tribunal, or corporation, that such court or corporation has arbitrarily abused the discretion confided to it by the law, or its charter, and no other adequate remedy is open, the superior court, by a writ of mandamus, may control such inferior tribunal or corporation, so as to correct such abuse and compel it to so exercise its discretion as to conform to lawful and just methods of procedure. (State v. Board, 503.)

4. **MANDAMUS—SCHOOL ELECTION.**—Mandamus is properly brought in the name of the state on the relation of taxpayers residing in a school district to compel its board of directors to rescind appointments of judges and clerks made by it for an election of a member of such board to be held thereafter. (State v. Board, 503.)

MARRIAGE AND DIVORCE.

1. **MAINTENANCE—PHYSICIAN'S BILL.**—In a suit against a husband for maintenance, the payment of a physician's bill for services to his wife may be directed to be made. (Murray v. Murray, 97.)

2. **FRAUDULENT TRANSFERS, RELIEF AGAINST.**—In a suit for maintenance, wherein the wife attacks transfers as made in fraud of her rights, the judgment should not interfere with such transfers further than is required for her protection, and, if a receiver is appointed, the court should declare precisely what property is to remain in his hands, and the balance should be excepted from the effect of the judgment. (Murray v. Murray, 97.)

3. **JURISDICTION, CONSTRUCTIVE SERVICE OF PROCESS.**—In a suit for maintenance, where the defendant is a nonresident, and process is served by publication, the court cannot require defendant to execute a bond in favor of the plaintiff for the payment of alimony. No personal obligation can be imposed upon a nonresident under such circumstances. (Murray v. Murray, 97.)

4. **FRAUDULENT TRANSFER—PARTIES NOT BEFORE THE COURT.**—In a suit for maintenance, it is error to declare void transfers made by a husband to persons who are not parties to the suit. (Murray v. Murray, 97.)

5. **JURISDICTION—TAKING POSSESSION OF PROPERTY—CONSTRUCTIVE SERVICE OF PROCESS.**—If, in an action by a wife for maintenance, a receiver is appointed, and property of the husband taken into his possession, after which the summons is served by publication, a judgment for such maintenance is valid as to the property in the possession of the court by its receiver. (Murray v. Murray, 97.)

See Contracts, 2; Receivers, 2.

MARRIED WOMEN.

See *Elstoppe*, 4; *Husband and Wife*, 2; *Landlord and Tenant*, 1.

MARSHALING SECURITIES.

See *Husband and Wife*, 4.

MASTER AND SERVANT.

1. PROFITS OF BUSINESS, WHAT ARE.—Where an employé was to have a specified percentage of the profits of his employer's business, the latter is not entitled to have the jury instructed that, in estimating such profits, they must allow for the annual depreciation of the plant used in the business, if it appears that there is no general rule upon the subject. The jury may be left to determine from the evidence in the cause, including that afforded by the employer's own books, what was contemplated by the contract as profits of the business. (*Sands v. Potter*, 253.)

2. MASTER AND SERVANT.—THE FORMATION OF A CORPORATION BY A MASTER after the employment of his servant, in the name of which the business is subsequently carried on, all the stock being taken by the master, and the business conducted as before, does not abrogate the contract of employment, and the master remains liable to his employé. (*Sands v. Potter*, 253.)

3. MASTER AND SERVANT—INSANITY.—The insanity of a master does not terminate a contract for service entered into between him and a servant while he was sane. Notwithstanding such insanity, the mutual engagement of hire and the object of service remain. The rule is applicable, though the contract gives the employer the right to terminate it at any time, and such right cannot be exercised by him because of his insanity, for, in such circumstances, the court might authorize his guardian or other representative to exercise the option, if its exercise was deemed in the interests of the employer. (*Sands v. Potter*, 253.)

4. MASTER AND SERVANT—MINOR EMPLOYEES, DUTY TO INSTRUCT.—Owners of dangerous machinery, employing an inexperienced minor about it, unacquainted with its nature or use, are bound to take care that he is instructed therein. If they neglect this, or give directions to use the machinery in a manner which must lead to danger of which he is not likely to be fully aware, they are liable for any injury done to him in the use of machinery in that manner. (*Foley v. California Horseshoe Co.*, 87.)

5. MASTER AND SERVANT — FELLOW-SERVANTS. — Between an assistant foreman and a boy subject to his orders the relation of fellow-servants does not exist so as to relieve the employer from liability for injuries received by the boy from obeying the orders of such foreman. (*Foley v. California Horseshoe Co.*, 87.)

6. MINOR EMPLOYEES—NEGLIGENCE, OBEYING FOREMAN. A minor cannot be expected to set up an opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, and it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master. (*Foley v. California Horseshoe Co.*, 87.)

7. MINOR EMPLOYEES PUT TO WORK AT TASKS WITH WHICH THEY ARE NOT FAMILIAR.—If a minor is put to a task which, while within the range of his employment, is as to him, because of his youth and inexperience, unusual and strange, and though he knows that the machine with which he is at work is liable to start and injure him, yet he will not, as a matter of law, be adjudged guilty of contributory negligence if injured by the sudden

starting of a machine while he is at work in a strange and unusual place, and at the command of his foreman. (*Foley v. California Horseshoe Co.*, 87.)

8. MINOR EMPLOYÉES, WHEN ASSUME KNOWN RISKS.—Where the ordinary and usual occupation of a minor is the running of a machine or is some employment in and about it, and he is shown to have knowledge of its working, its dangers, and defects, and he is not of such tender years as to be unable to apprehend the nature of the dangers and defects, he takes upon himself, as will an adult under like circumstances, the perils of his employment, and, if injured in the course thereof, cannot recover of his employer. (*Foley v. California Horseshoe Co.*, 87.)

9. A MASTER IS NOT RESPONSIBLE FOR THE NEGLIGENT PERFORMANCE OF SOME DETAIL OF WORK intrusted to a servant, whatever may be the grade of the servant who executes such detail, though by his negligence, or want of judgment, another servant is injured. If the work is the work of the servant, and he undertakes to perform it, and the master is not at fault in not furnishing proper materials, there is no breach of duty on his part. (*Kimmer v. Weber*, 630.)

10. MASTER AND SERVANT—ADOPTION OF UNSAFE SCAFFOLDING.—If, when a gang of workmen commence work on a building, they find there a scaffolding which had been used by other workmen, and use it or adopt it as part of a scaffolding to be used by them without any direction from the common employer, he is not answerable for defects therein from which one of such workmen receives injury. (*Kimmer v. Weber*, 630.)

11. MASTER AND SERVANT—ERROR OF JUDGMENT ON THE PART OF FOREMAN.—If workmen have constructed a scaffolding for their use, and a third person, thinking it insufficient and unsafe, calls the attention of the foreman of the builders thereto, who replies that he thinks it will do, and it subsequently proves insufficient, and through its defects injures one of such workmen, the common employer is not answerable. The construction of the scaffolding was a detail of the work with which the workmen themselves were charged, and the foreman had a right to trust to their own judgment in the matter. All of the employés who concurred in determining that the scaffolding was safe may be regarded as fellow-servants. (*Kimmer v. Weber*, 630.)

12. MASTER AND SERVANT—DETAILS FOR WHICH MASTER IS NOT ANSWERABLE.—If a gang of masons are at work upon a building, and the construction of a platform becomes necessary to the prosecution of their work, this is one of the details of the business which is generally left to the workmen themselves, and when the master does not take it out of their hands, nor furnish defective materials to be used in it, and it is in fact constructed by the workmen according to their own judgment, and, through some defect in its construction, one of them is subsequently injured, the master, or common employer, is not answerable. (*Kimmer v. Weber*, 630.)

13. MASTER AND SERVANT—FELLOW-SERVANTS.—If workmen find it necessary during their work to erect scaffolding, and, by the negligence of any of them, such scaffolding breaks, and injures one of their number, he cannot recover of the common employer, because the injury is due to the negligence of his fellow-servants. (*Kimmer v. Weber*, 630.)

14. MASTER AND SERVANT—FELLOW-SERVANT—LIABILITY.—Subsequent or even contemporaneous approval by the master of work directed and controlled by the servant may free the latter

from all liability to the former, but cannot free him from liability to his fellow-servants for his negligence. (*Atkins v. Field*, 424.)

15. MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY OF FOR NEGLIGENCE.—If a servant personally selects the material and mode of setting up an apparatus furnished by the master, the former is liable to his fellow-servants for injuries caused by his negligence in performing the work, although it is satisfactory to, and approved by, the master. (*Atkins v. Field*, 424.)

16. MASTER AND SERVANT—FELLOW-SERVANT—LIABILITY OF.—If, in setting up an apparatus, a fellow-servant does not exercise his own judgment or discretion, but simply follows the directions of a higher authority, he is not liable to a coemployé for deficiency in material or arrangement. (*Atkins v. Field*, 424.)

MECHANICS' LIENS.

1. MECHANICS' LIENS AGAINST PURCHASER.—A third person who purchases property before the time for filing a mechanic's lien against it has expired, or who extends the time for filing such lien by labor performed at his special instance and request, may be required to pay such lien, although in purchasing he relies upon the representations of the vendor that the contractor's claims against the property have all been paid in full. (*Conlee v. Clark*, 298.)

2. MECHANICS' LIENS—LAST WORK DONE—TIME OF FILING LIEN.—Necessary work done by a contractor to correct his own mistake or to remedy a defect caused by his own negligence in the performance of his contract for which he is not entitled to make any charge may be considered as the last work done for the purpose of fixing the time from which the period allowed for filing the lien dates. (*Conlee v. Clark*, 298.)

MINES.

1. MINING LAWS—DISCOVERY, WHAT IS.—When a locator finds rock in place, containing mineral, he has made a discovery within the meaning of the statute authorizing the location of mining claims, whether the rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes a discovery, and warrants the prospector in making a location of a mining claim. Nor need the locator expect to find a paying mineral in the particular crevice, vein, or seam in which he finds the rock in place. It is sufficient that he expects by following up that crevice, vein, or seam to find a main body of ore of commercial value within the ground located. (*McShane v. Kenkle*, 579.)

2. MINING LAWS—DISCOVERY SUFFICIENT TO JUSTIFY THE LOCATION OF A QUARTZ CLAIM.—It is not essential, in order to sustain the location of a mining claim, that the vein discovered contain mineral, quartz, or ore of such a nature that a practical miner, if he encountered it, would feel justified in following it up, and developing it. An instruction to this effect is erroneous. If the rock discovered is in place, and carries enough precious metal in it to justify the locator in expending time and money in prospecting and developing the ground located, the discovery is valid, and a location thereof may be made, no matter what the locator's vocation may be. (*McShane v. Kenkle*, 579.)

3. MINES, WHEN DEEMED TO BE OPENED.—A mine lawfully leased to be opened is an open mine within the reason of the rule permitting a life tenant to mine open mines. (*Koen v. Bartlett*, 884.)

See Landlord and Tenant, 4, 5.

MISTAKE.

See Evidence, 2; Equity, 2; Fraud, 4.

MONOPOLIES.

1. TRADE RESTRAINT — MONOPOLIES — COMBINATIONS BETWEEN INDIVIDUALS or firms for the regulation of prices and of competition in business are not monopolies, and are not unlawful as in restraint of trade so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. (*Herriman v. Menzies*, 81.)

2. A MONOPOLY EXISTS WHEN all or so nearly all of an article of trade or commerce in a community or district is brought within the hands of one man, or set of men, as to practically bring the production of the commodity or thing within such single control, to the exclusion of all competition or free traffic therein. Anything less than this is not a monopoly. (*Herriman v. Menzies*, 81.)

MORTGAGES.

1. MORTGAGE—EQUITY OF REDEMPTION.—The purchase by a mortgagee of the equity of redemption from the mortgagor at a time when there was a great stringency in the money market, and therefore an inability to borrow money at a price greatly less than the purchaser was willing to pay if necessary to effect the purchase, the purchaser not being aware that it was possible to obtain a greater price, is not fraudulent and will not support an action against the mortgagee for damages, though the premises were advertised for sale under the decree of foreclosure when the equity of redemption was thus purchased. (*De Martin v. Phelan*, 115.)

2. MORTGAGE.—THE RELATION BETWEEN A MORTGAGOR AND MORTGAGEE is not fiduciary where the mortgage does not convey the legal title nor give the mortgagee any control over the estate. (*De Martin v. Phelan*, 115.)

3. NOTICE FROM RECORD OF MORTGAGE CONTAINING AN INCORRECT DESCRIPTION.—The record of a mortgage of lot 16 in block 67 is not notice of an intention to mortgage lot 16 in block 57, though the mortgagors were the owners of that lot and not of the one described in the mortgage. (*Baker v. Bartlett*, 594.)

4. MORTGAGES—MORTGAGEE AS PURCHASER AND TRUSTEE.—A mortgagee is a trustee and is not allowed to purchase at his own sale. If he does so, he is still a trustee. (*Shew v. Call*, 678.)

5. A MORTGAGEE IN POSSESSION OR HIS ALIENEE, not guilty of fraud, is not chargeable with rents pending a suit to foreclose a mortgage or trust deed. (*Stout v. Philippi Mfg. Co.*, 843.)

See Chattel Mortgages; Husband and Wife, 4.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS, TORTS OF OFFICERS, NONLIABILITY FOR.—Where an officer of a corporation has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort, whereby a citizen is injured in person or property, the tort is the act of the officer only, and ordinarily, no recovery of damages can be had except against him. (*Sievers v. San Francisco*, 153.)

2. MUNICIPAL CORPORATIONS—LIABILITY FOR ERRORS OF THEIR OFFICERS.—Where an injury results to a property owner from a wrong or omission of an officer of a municipality, charged with a duty prescribed and limited by law, he is not treat-

ed as a servant or agent of the corporation, and it is not liable for his error or omission. (*Sievers v. San Francisco*, 153.)

3. A MUNICIPALITY IS NOT LIABLE FOR A MISTAKE OF ITS ENGINEER and surveyor in furnishing incorrect lines of grade to a contractor by which he is misled and caused to grade a street to a greater height than the official grade, to the injury of an adjacent property owner. (*Sievers v. San Francisco*, 153.)

4. MUNICIPAL CORPORATIONS, STREETS, INJURIES FROM GRADING, WHEN NOT LIABLE FOR.—If a contract is let after legal proceedings for the grading of a street to the official grade, and an abortive attempt is made by the board of supervisors to change the grade, and, believing the grade to have been changed, the city engineer and surveyor furnishes a line of grade corresponding to the changed grade, and the street is graded accordingly, to the injury of a property owner, who would not have been injured had it been graded to the official grade, he cannot recover damages therefor of the municipality. (*Sievers v. San Francisco*, 153.)

5. MUNICIPAL CORPORATIONS ARE NOT LIABLE IN DAMAGES FOR THE MANNER in which they exercise, in good faith, their discretionary powers of a public, legislative, or quasi judicial character, but are liable to actions for damages where their duties cease to be judicial in their nature and become ministerial. (*Chicago v. Siben*, 245.)

6. MUNICIPAL CORPORATION, LIABILITY OF FOR SYSTEMS OF SEWERAGE AND DRAINAGE.—The adoption of a general plan of sewerage involves the performance of a duty of a quasi-judicial character, but the construction and regulation of sewers, and the keeping them in repair after the adoption of such general plan, are ministerial duties, and a municipality which constructs and owns such sewers is liable for the negligent performance of such duties. (*Chicago v. Seben*, 245.)

7. MUNICIPAL CORPORATIONS.—FOR NOT KEEPING STREETS AND SEWERS IN REPAIR after they have been constructed, a city is answerable to a person injured thereby, where, as in Illinois, the jurisdiction and control of streets and their improvement are conferred upon municipal governments. The rule is otherwise as to counties and as to towns which do not act under charters. (*Chicago v. Seben*, 245.)

8. MUNICIPAL CORPORATIONS—BREACH OF THE PEACE—FINE—VOID ORDINANCE.—A city ordinance fixing a less penalty for an offense than that fixed by statute for the same offense is void. Hence, if a city ordinance imposes a penalty of not less than ten nor more than one hundred dollars for a breach of the peace, while the minimum fine under the statute is one cent and maximum fine is one hundred dollars, in addition to which imprisonment not less than five nor more than fifty days may be inflicted, the ordinance is void. (*Taylor v. Owensboro*, 861.)

9. MUNICIPAL CORPORATIONS—NONLIABILITY OF, FOR ACTS OF OFFICERS IN ENFORCING PENAL LAWS.—As municipalities represent the commonwealth, and municipal officers, while engaged in duties relating to the public safety, and in the maintenance of public order, are the servants of the commonwealth, although their duties may be confined to the enforcement of the law within a specified territory, a city is not liable for the acts of its officers in enforcing the criminal or penal laws of the commonwealth, or in enforcing the penal ordinances of the city. It would not, therefore, be liable for the acts of its officers in enforcing a judgment of conviction for a breach of the peace, though such judgment were void. (*Taylor v. Owensboro*, 861.)

10. STREETS.—ABUTTING PROPERTY OWNERS UPON STREETS, the fee of which is in the municipality, are not given any new or additional right therein by a statute requiring the consent of the owners of more than one-half the frontage upon the street before the common council of the municipality can authorize the construction of a railway therein. (*Doane v. Lake Street etc. Ry. Co.*, 265.)

11. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—A city vested with power to regulate the use of its streets has no right to grant the exclusive use of the surface beneath its streets for the private gain of its grantee, though he intends to lease it to others for a public use. Such a grant is a delegation of powers and control which the city alone can exercise. (*State v. Murphy*, 515.)

12. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—If a telegraph or other such corporation has express power from the state to place its wires and other fixtures under ground in the streets of a city, upon obtaining the consent of the latter, the city, by merely giving such consent, reserves no power of regulation, except such as is incident to the regulation of the use of the streets and such as the safety and welfare of the public may demand. Any further rights reserved to the city must be secured as conditions of the grant or consent. (*State v. Murphy*, 515.)

13. MUNICIPAL CORPORATIONS—STREETS—REGULATING USE OF.—Power vested in a city to regulate the use of its streets does not authorize it to grant their use to another for subways to conduct electricity, though his sole purpose may be to lease them to wire-using corporations, unless the city reserves the power to supervise and control, not only the work of excavating in the streets, but also of all matters incident to location, construction, maintenance, and use for such purpose. (*State v. Murphy*, 515.)

14. MUNICIPAL CORPORATIONS—STREETS—USE OF.—A city vested with power to regulate the use of its streets has no power to divert their uses from those to which they were dedicated. (*State v. Murphy*, 515.)

15. MUNICIPAL CORPORATIONS—ESTOPPEL.—The doctrine of estoppel cannot be applied as against a city, to validate a contract which it has no power to make. (*State v. Murphy*, 515.)

16. MUNICIPAL CORPORATIONS — STREETS — POWER TO REGULATE USE OF—PRIVATE USE.—A city, vested with power to regulate the use of its streets, has no power to grant a private corporation the right to occupy them by conduits beneath the surface, for the purpose of conducting electricity, without requiring them to be used for the benefit of the public, and without reserving any control over the business or use of the corporation. Such a grant is for a private use, and ultra vires and void. (*State v. Murphy*, 515.)

17. MUNICIPAL CORPORATIONS — STREETS — ELECTRIC WIRES UNDER GROUND.—A city vested with power to regulate the use of its streets has power to authorize, and, if public safety and general welfare demand it, to require, all electric wires used for the benefit of the public to be laid under ground. (*State v. Murphy*, 515.)

18. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—The dedication of streets to public uses includes as well the soil beneath them as the surface. The city has the same power to regulate the use of the streets beneath as upon the surface thereof, and such power is in like manner limited to public uses in existence and those which may spring into existence. (*State v. Murphy*, 515.)

19. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—Power vested in a city to regulate the use of its streets refers to legitimate public uses not inconsistent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners. An ordinance having the effect of diverting the streets from a public to a private use, or of unreasonably diverting and appropriating them to a public use other than that of ordinary travel, is ultra vires and void. (*State v. Murphy*, 515.)

20. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—Under general power to regulate the use of its streets, a city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface, or through conduits beneath the surface, provided such structures do not materially interfere with the ordinary uses of the streets and public travel thereon, but the city has no power to authorize such a use of the streets as will destroy its usefulness as a public thoroughfare. (*State v. Murphy*, 515.)

21. MUNICIPAL CORPORATIONS—STREETS—REGULATION OF USE OF.—A municipal corporation vested with power to regulate the size of its streets, can permit the use of their surface for the erection of telegraph and telephone poles, and the laying of railroad tracks, the space above the surface for stringing electric wires for the transmission of messages and the creation of light, and may also permit the laying of water and gas pipes and sewers beneath the surface. (*State v. Murphy*, 515.)

22. MUNICIPAL CORPORATIONS—ORDINANCES—FILLING DEPRESSIONS.—A city ordinance requiring parties making, or causing to be made, any excavation in or adjoining any public street, alley, highway, or public place, to so fence it as to prevent injury to persons, animals, or vehicles, does not apply to one who purchasing property with an excavation already upon it. (*Moran v. Pullman etc. Car Co.*, 543.)

23. MUNICIPAL CORPORATIONS—ORDINANCES—LIABILITY OF CITY.—A city is not liable in damages for injury to persons resulting from a failure to enforce ordinances requiring excavations and depressions in city lots adjacent to the highway or street to be filled or fenced by property owners. (*Moran v. Pullman etc. Car Co.*, 543.)

24. MUNICIPAL CORPORATIONS—ORDINANCES.—A municipal ordinance cannot create a civil liability against a person violating it and in favor of persons injured by its violation. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes. (*Moran v. Pullman etc. Car Co.*, 543.)

25. MUNICIPAL CORPORATIONS—ORDINANCES REQUIRING DEPRESSIONS AND EXCAVATIONS within a city which are below the natural or artificial grade of surrounding or adjacent streets to be filled or fenced, and prescribing a penalty for failure to comply with the requirements of the ordinances, apply only to cases where the owner's property extends up to the highway, and the excavation or depression is in such close proximity to such highway as to endanger the safety of travelers on such highway. (*Morgan v. Pullman etc. Car Co.*, 543.)

26. MUNICIPAL INDEBTEDNESS, PROHIBITION AGAINST CREATING.—Under a constitutional provision against the incurring of any indebtedness by a county which cannot be paid out of the funds on hand and the levy of the current fiscal year, orders issued by the county to a contractor in payment for the construction of a

courthouse, payable out of funds to be raised from tax levies to be made in a subsequent year, are void. (*Merchants' Nat. Bank v. Spates*, 828.)

MURDER.

See Assault.

MUTUAL MISTAKE.

See Equity, 3.

NEGLIGENCE.

1. NEGLIGENCE—DAMAGES—RECOVERY IN STATUTORY ACTION FOR CAUSING DEATH BARS COMMON-LAW RIGHT OF ACTION.—If a wife is killed by the negligence of a railroad company, a recovery by the husband, as personal representative, of damages, under a statute allowing a right of action for a personal injury to survive to the personal representative, is a bar to his common-law right of action, as a husband, to recover damages for the loss of his wife's society from the time of the injury until her death. (*Louisville & Nashville R. R. Co. v. McElwain*, 885.)

2. NEGLIGENCE—EVIDENCE OF, POWER TO PRESCRIBE WHAT SHALL BE.—There is no doubt of the general power of the state to prescribe the rules of evidence which shall apply in judicial proceedings therein. It may, therefore, declare that the happening of an accident through a defect of the cars or appliances of a railway corporation shall be prima facie evidence of negligence on the part of the corporation, in an action brought against it by one of its employes. (*Pennsylvania Co. v. McCann*, 695.)

3. NEGLIGENCE, CONTRIBUTORY OF CHILDREN.—The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult is called upon to use in the same circumstances. (*Foley v. California Horseshoe Co.*, 87.)

See Electric Companies, 1-4; Joint Liability, 1; Real Property, 4; Release.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—FORGERY—ESTOPPEL. A party who, after maturity of a note, with full knowledge that his name is attached thereto, admits his liability thereon and that he will stand good for it is not thereby estopped from claiming that his signature was forged, although the holder extends the time of payment, unless such extension is induced by such admissions. (*Lewis v. Hodapp*, 295.)

2. NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION—TRANSFER—LIABILITY OF PAYEE.—A payee of a note without consideration, who transfers it to an innocent purchaser, is liable to the maker for any loss accruing to him from such transfer. (*Mader v. Cool*, 804.)

3. NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION—PAYMENT TO INNOCENT HOLDER.—Payment of a note by the maker to an innocent purchaser is not a voluntary payment such as will prevent recovery from the payee of the amount paid, if the note is without consideration, and this defense is lost by its transfer. (*Mader v. Cool*, 804.)

4. NEGOTIABLE INSTRUMENTS—EXECUTED GIFT—CONSIDERATION.—A note given without consideration, although payable in bank, cannot be regarded as an executed gift. (*Mader v. Cool*, 804.)

5. NEGOTIABLE INSTRUMENTS—PART FAILURE OF CONSIDERATION—RECOVERY.—If the consideration of a note fails in part only, there may be a recovery by the holder for the part as to which the consideration has not failed. (*Mader v. Cool*, 304.)

6. NEGOTIABLE INSTRUMENTS—CONSIDERATION.—If one is bound by an agreement not to do a certain thing at a certain place, a subsequent agreement to the same effect, made to procure the execution of a note, is not sufficient consideration therefor. (*Mader v. Cool*, 304.)

7. PAPER NEGOTIABLE IN FORM made by persons non compos mentis, infants, or married women is not within the rule which prohibits a bona fide holder of a negotiable instrument received before it becomes due from defenses which the maker might have made against the payee. (*Hosler v. Beard*, 720.)

8. NEGOTIABLE INSTRUMENTS—JOINT AND SEVERAL OBLIGATION OF "IRREGULAR INDORSERS."—If some of the promisors sign a promissory note at the foot, and others on the back, the obligation, toward the payee, of those who place their names on the back of the paper, though it is joint in form, is joint and several, and not joint, with the obligation of those who sign the note in the usual place, although the obligation of those who sign on the back of the note, as between themselves, may be joint. It may be joint as between themselves, and yet joint and several as to those who signed at the foot. (*Schultz v. Howard*, 470.)

9. NEGOTIABLE INSTRUMENTS—ORIGINAL PROMISORS OR MAKERS—WHO ARE.—Persons who sign their names on the back of a note, when it is executed, for the purpose of giving credit to the maker, with the payee, and as security for the payment of the note, are original promisors or makers, although, as between themselves and the other makers, they may be mere sureties for the latter. (*Schultz v. Howard*, 470.)

10. NEGOTIABLE INSTRUMENTS—WHEN RENEWAL IS WITHOUT CONSIDERATION.—If an original note has been given without consideration, each successive renewal thereof is without consideration, unless there is some consideration to support it other than the mere surrender and renewal of the original note. (*Turle v. Sargent*, 475.)

11. NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITIES—NO CONSIDERATION.—If a third party, without any consideration personal to himself, gives his promissory note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor or disadvantage to the creditor, the note is without consideration. Hence, if one partner misappropriates money belonging to his copartner, a note given by a third person to the latter upon his promise not to prosecute criminally, is without consideration. (*Turle v. Sargent*, 475.)

12. DEFINITIONS.—"IRREGULAR INDORSERS" are original promisors or makers, and the courts, in defining the nature of their obligation as makers, indorsers, or guarantors, have indiscriminately and interchangeably spoken of them as "original promisors," "joint makers," and joint and several makers." (*Schultz v. Howard*, 470.)

13. NEGOTIABLE INSTRUMENTS—SECOND INDORSERS—WHO ARE.—If a person not connected with the original consideration of a note indorses it after a prior indorsement by the payee, and below the signature of such payee, the law conclusively presumes it to have been done in aid of the negotiation of the note, and the party thereby becomes a second indorser. (*Bowler v. Braun*, 449.)

14. BILLS OF EXCHANGE, WHAT ESSENTIAL TO.—To a bill of exchange there are three parties—drawer, drawee, and payee. The drawee is not bound until acceptance, and then, having become an acceptor, he is regarded as primarily the promisor, and the drawer is liable collaterally only. (*Industrial Bank v. Bowes*, 228.)

15. BILL OF EXCHANGE, PRESENTMENT OF, TO CHARGE DRAWER.—A bill of exchange must be presented to the drawee within a reasonable time, and, if payment is refused, notice must be promptly given to the drawer. Otherwise he cannot be held liable thereon. (*Industrial Bank v. Bowes*, 228.)

16. NON-NEGOTIABLE INSTRUMENTS, MEASURE OF DAMAGES, RECOVERABLE AGAINST ASSIGNOR.—An assignor of a non-negotiable instrument which proves worthless is not liable to any assignee thereof beyond the consideration actually received by the defendant for his assignment. Hence, in an action by an assignee against a remote assignor, the complaint must allege a consideration for the assignment made by the defendant. (*Goff v. Miller*, 889.)

17. NON-NEGOTIABLE INSTRUMENT.—ONE WHO DEALS IN non-negotiable property acquires it subject to all equities in the maker and the right of recourse against remote assignors, subject to their equities, whether he knows thereof or not. (*Goff v. Miller*, 889.)

18. NEGOTIABLE INSTRUMENTS—CONSIDERATION.—A note given by a surety on the bond of a defaulting bank cashier in settlement of defalcation, is supported by sufficient consideration if it appears that because the note was given, the bond was surrendered, or that the bank forbore to sue thereon, or that it was given as a compromise and credited on the cashier's account, or that, in reliance on such compromise, there was a change in the position of the parties, so as to make restoration of the status quo impossible, or that the credit of the bank was maintained by such compromise, or that it was the basis for permission given by authority to continue the banking business. (*Fink v. Farmers' Bank*, 746.)

19. NEGOTIABLE INSTRUMENTS.—A BONA FIDE PURCHASER of a negotiable instrument can recover thereon only the amount paid therefor with interest, where the instrument was fraudulent in its inception and without consideration between the original parties. (*Oppenheimer v. Bank*, 778.)

20. NEGOTIABLE INSTRUMENTS.—A STIPULATION IN A PROMISSORY NOTE to pay all reasonable attorneys' fees in case suit is brought to enforce payment does not destroy its negotiability. (*Oppenheimer v. Bank*, 778.)

21. NEGOTIABLE INSTRUMENTS.—INADEQUACY OF PRICE paid for negotiable paper may be so gross as to justify the conclusion that the purchaser is chargeable with notice of a fraudulent or defective title on the part of the vendor; but the purchase at a discount of twenty per cent does not necessarily show such a discrepancy between the amount paid and the commercial value of the paper as to charge the purchaser with notice of fraud in the obtaining of the paper by its original holder. (*Oppenheimer v. Bank*, 778.)

22. THE ASSIGNOR OF A NON-NEGOTIABLE INSTRUMENT WARRANTS by implication that it is a valid and subsisting debt, and that the maker of the instrument is solvent, or will be when it becomes due. (*Merchants' Nat. Bank v. States*, 828.)

See Alteration of Instruments; Assignment; Evidence, 4; Insane Persons, 1-5; Partnership, 8.

NEW TRIAL.

WITNESSES—ABSENCE OF AS GROUND FOR A NEW TRIAL.—The refusal of a court to grant a continuance or postponement of the trial to enable a party to procure the testimony of a witness is not ground for a new trial, especially if such party has not exercised due diligence to obtain such testimony, prior to the trial. (*Atkins v. Field*, 000.)

OIL MINES.

See *Landlord and Tenant*, 5.

OFFICERS.

1. OFFICERS—OFFICIAL BONDS—CONTINUING LIABILITY.—The presumption that official bonds apply only to the existing term of the officer is not conclusive; and if it is clear that the parties meant to create a continuing liability, the bond must be held to have done so. (*Fink v. Farmers' Bank*, 746.)

2. POWERS—EXECUTION OF DEED, BY CLERK OF COURT, AFTER HE IS OUT OF OFFICE.—A clerk of court has no power to execute a deed after he goes out of office. Hence, if land mortgaged to a clerk of court, as provided by statute, with power of sale, to secure a bill of costs and a fine, is sold by him under such power, a deed executed by him after he goes out of office is void. (*Shew v. Call*, 678.)

3. CONSTITUTIONAL LAW—DISABILITY OF MEMBER OF LEGISLATURE TO HOLD OFFICE.—Under the provision of a state constitution, providing that no senator or representative shall, "during the time for which he is elected," hold any office under the authority of the United States, or of the state, except that of postmaster, the disability of a member of the legislature to hold office does not cease until the expiration of the full period of time for which he was elected, though he resigns during that time. (*State v. Sutton*, 459.)

4. PUBLIC OFFICERS, LIABILITY OF FOR PUBLIC MONIES.—A supervisor or other public officer acting in good faith and without negligence is responsible for the loss of moneys which come to his official custody, and therefore is answerable for moneys deposited with a firm of private bankers to his credit as such officer, upon such moneys being subsequently lost by the failure of the bankers, though in making the deposit he acted in good faith and without negligence. (*Tillinghast v. Merrill*, 612.)

5. OFFICIAL BONDS.—MUTUAL MISTAKE between the parties to an official bond as to the time in which it shall be of effect and in force may be corrected in equity. (*Lewiston v. Gagne*, 432.)

6. OFFICIAL BONDS—ACCEPTANCE—LIABILITY OF SURETIES.—After a surety has signed an official bond and it has been accepted, nothing short of information, which, in the exercise of prudence, requires the withholding of official duties from the principal, can release the surety. (*Lewiston v. Gagne*, 432.)

7. OFFICIAL BONDS—LIABILITY OF SURETIES.—NOTICE BY SURETIES OF A CLAIM TO BE RELIEVED from liability on an official bond by reason of the principal having procured an additional surety cannot have any effect subsequent to the approval of the bond. (*Lewiston v. Gayne*, 432.)

8. OFFICIAL BONDS—LIABILITY OF SURETIES.—One who signs an official bond as surety at the request of the principal, thereby, qua the obligee, gives him implied authority to procure additional sureties to make the bond satisfactory to the obligee, and it makes no difference when the additional sureties are obtained. The assur-

ance of the principal that certain persons are to sign the bond, who do not, does not release a surety who signs the bond. (*Lewiston v. Gagne*, 432.)

9. OFFICIAL ACTION, WHEN JUDICIAL AND WHEN MINISTERIAL.—Official action is judicial when it is the result of judgment or discretion. Official duty is ministerial when it is absolute, certain, and imperative, involving the mere execution of a set task, and when the law which imposes it prescribes the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. (*Chicago v. Seben*, 245.)

See *Sheriffs*.

ORDERS.

See *Assignment*.

PARENT AND CHILD.

1. A PARENT SHOULD NOT BE DEPRIVED OF THE CUSTODY OF HIS CHILD by awarding its control to a third person where the character of the parent is not assailed. If the court deems that the custody ought not to be awarded to the mother, then it must be given to the father in preference to any third person, where the father is without fault, and is not shown to be unfit to have the care and custody of his child. (*Miller v. Miller*, 166.)

2. PARENTS' MISCONDUCT—CUSTODY OF CHILDREN.—If, as between the two parents, one has, by evil habits or improper conduct, become an unfit custodian of their child, its custody should be awarded to the other. (*Miller v. Miller*, 166.)

3. PARENTS' RIGHT TO CUSTODY OF CHILDREN.—Neither parent has any absolute right to the custody of their child. The court may, when its interests so demand, leave it where its interests will be best promoted. Hence, though by the common law the father's right to the custody of legitimate children is paramount to that of the mother, the child may, nevertheless, be awarded to her, where, from its age, sex, or any other cause, its welfare will probably be best advanced by leaving it in her care. (*Miller v. Miller*, 166.)

4. CHILDREN, CUSTODY OF.—A court may refuse to award the custody of a child to either parent, and place it in the control of a third person in a proper case. (*Miller v. Miller*, 166.)

PARDON.

1. PARDONING POWER, LEGISLATIVE ACTS, WHEN INFRINGE UPON.—If, by the statutes of the state, a conviction of larceny disqualifies a convict as a witness, this disqualification is a part of his punishment for the crime, and to remove the disqualification is an exercise of the pardoning power, and therefore a statute purporting to remove it is void where the pardoning power has by the constitution been vested in the governor and other officers named therein. (*Singleton v. State*, 170.)

2. A PARDON BLOTS OUT THE CRIME COMMITTED, and removes all disability resulting from the conviction. (*Singleton v. State*, 170.)

3. CONSTITUTIONAL LAW—PARDONING POWER.—Under a provision of a state constitution vesting in the governor and other officers named therein power to remit fines and forfeitures, to commute punishment, and grant pardons after conviction, the pardoning power is vested exclusively in such persons; and an act of the legislature purporting to restore a person named therein to civil rights, and reciting that he has been found not to be guilty of the

crime of which he was convicted and sentenced to punishment, is unconstitutional and void. (Singleton v. State, 177.)

PARTITION.

See Advancements, 8.

PARTNERSHIP.

1. PARTNERSHIP—PARTNER CANNOT HOLD FIRM PROPERTY AS EXEMPT.—A partner cannot claim and hold firm property as exempt from attachment or execution. (Green v. Taylor, 875.)

2. PARTNERSHIP—WHO ARE PARTNERS—HOLDING OUT. Those who hold themselves out as partners, and buy as such, must be so considered, in an action by creditors. (Green v. Taylor, 875.)

3. NEGOTIABLE INSTRUMENTS—PARTNERSHIP NOTE—INDORSEMENT BY ONE PARTNER.—If one member of a partnership makes a note in his own name payable to the order of his firm, indorses the name of such firm thereon, and requests a bank to place the proceeds of the note, after discount, to his personal credit on its books, the bank thereby has notice of such facts as puts it on inquiry, and prevents it from becoming a bona fide holder, in case such indorsement is unauthorized. (Brown v. Pettit, 742.)

See Railroads, 17.

PATENTS.

1. LETTERS PATENT, RESCISSION OF TRANSFER, WHEN NECESSARY.—In an action to recover the price agreed to be paid for an assignment to the defendant of letters patent, he is not, as a condition of interposing the defense of want of consideration arising from the invalidity of the patent, required to reassign to the plaintiff. (Herzog v. Heyman, 646.)

2. LETTERS PATENT, AUTHORITY OF STATE COURT TO DETERMINE INVALIDITY OF.—In an action to recover the price agreed to be paid for the assignment of letters patent, the defense may be made that the agreement was without consideration, for the reason that the letters were invalid, and upon such defense being interposed in the state court, it has jurisdiction, as an incident of the action, to inquire into and determine the validity of the patent. (Herzog v. Heyman, 646.)

3. LETTERS PATENT, IMPLIED WARRANTY AND SALE OF.—While it is possible for parties to enter into an agreement for the sale of the right, if any, which one of them has under letters patent, and by which agreement he is entitled to recover the price, whether the letters are valid or not, the evidence that such was the agreement should be very clear. Otherwise the parties will be assumed to have contracted for the transfer of a valid patent right, and the promise to pay the purchase price will be deemed without consideration and nonenforceable, if the patent is shown to be invalid. (Herzog v. Heyman, 646.)

4. PATENT RIGHTS—DEFENSE OF WANT OF CONSIDERATION.—A holder of a patent may defend an action against him for the purchase price, if the patent is void. This is especially true if a decree has been rendered against the purchaser, though the vendor was not a party to the suit, and adjudging the patent to be an infringement, or otherwise depriving the purchaser of any beneficial use thereof. (Herzog v. Heyman, 646.)

PERSONAL SERVICES.

See Services.

PHYSICIANS AND SURGEONS.

PUBLIC POLICY.—A WAIVER OF THE RIGHT TO HAVE INFORMATION ACQUIRED BY A PHYSICIAN while attending his patient regarded as a privileged communication, not to be disclosed in evidence without the consent of the patient, is not against public policy when made in an application for life insurance, and is therefore valid, and may be enforced after the death of the patient against any person claiming under the contract of which the waiver was part. (*Foley v. Royal Arcanum*, 621.)

PLEADING.

1. PLEADING—DEMURRER—DETERMINING MEASURE OF DAMAGE.—A demurrer is not the proper method of determining what is a proper measure of damage. Hence, if the complaint shows a wrong committed by the defendant, actionable in favor of the plaintiff, it is good, although nominal damages only may be recoverable; and the insertion of a claim of special damage, not legally recoverable, would not be a cause of demurrer. (*Elliott v. Kitchens*, 69.)

2. PLEADING—SUBSTANTIAL CAUSE OF ACTION.—Each count of a complaint that will support a judgment by default contains a substantial cause of action. (*Elliott v. Kitchens*, 69.)

3. PLEADING—GENERAL ISSUE—WAIVER OF FORMAL PROOF.—While the plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiff the necessity of proving them, the defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof, and, in such a case, it should be left to the jury to say whether it is waived or not. (*McKay v. Southern Bell Teleph. Co.*, 59.)

4. PLEADING—EVIDENCE.—Under a plea of non est factum to a suit on a note, evidence is admissible to show that the note was signed by the defendant or by another with full authority from him. Hence, a reply to such plea setting up such fact is not subject to demurrer. (*Lewis v. Hodapp*, 295.)

5. PLEADING.—A special answer of non est factum closes the issues and neither requires, nor strictly speaking admits, a replication. (*Lewis v. Hodapp*, 295.)

6. PLEADING—DENIAL FOR WANT OF INFORMATION.—A denial stating, with respect to a specified allegation of the complaint, that the defendant has no knowledge or information upon which to found a belief, and therefore he denies the same, is insufficient to form an issue. If the complaint is verified, the denial of each allegation must be specific, and made positively or according to the information and belief of the defendant. (*State v. Butte City Water Co.*, 574.)

See Electric Companies, 2-4.

PRACTICE.

See Trial, 5-7.

PRINCIPAL AND AGENT.

See Agency.

PROBATE SALES.

See Executors and Administrators.

PUBLIC OFFICERS.

See Officers, 4.

RAILROADS.

1. STREET RAILWAYS—DUTY TO MAKE CHANGE.—A tender by a passenger of a five-dollar bill in payment of five cents fare is unreasonable, when the rules of the company do not require its conductors to furnish change beyond the amount of two dollars; and it is not material that the existence of the rule be known to the passenger. The conductor has a right to eject him from the car, though he has no other means with which to make payment. (*Barker v. Central Park etc. R. R. Co.*, 626.)

2. RAILROADS—FAILURE TO FENCE—RIGHT TO JOIN FENCES—DAMAGES.—If a railroad company, having a mere easement in its right of way across farm lands, is required by statute to fence its road, an adjoining landowner may maintain an action for damages for its failure to fence. The primary duty of the company is to build its fence on the line, margin, or edge of its right of way, and it cannot, by building the fence inside of the line of its right of way, deprive such owner from joining his fences to those of the company. Hence, in such action, the landowner may show, as an element of damages, that he would have the legal right to join his fences with those of the company, whether built on or inside of such line, and that the failure of the company has deprived him of the benefit of such right. (*Gould v. Great Northern Ry. Co.*, 453.)

3. RAILROADS—FENCES—CONSTRUCTION OF STATUTE.—The words "on each side of such road" in a statute requiring a railroad to be fenced "on each side of such road" mean that the fence must be built on the margin or border of the entire railroad right of way, and, therefore, on the division line between such right of way and that of the adjoining proprietor. (*Gould v. Great Northern Ry. Co.*, 453.)

4. STREETS—NEW SERVITUDE.—The erection of an elevated street railway in the streets is not a subjecting them to an improper use or new servitude. (*Doane v. Lake Street etc. Ry. Co.*, 265.)

5. STREETS.—THE ILLEGAL OR UNAUTHORIZED USE OF A STREET FOR AN ELEVATED RAILWAY, where the fee of the street is in the municipality, does not entitle an owner of abutting property to an injunction. The only remedy therefor is an information filed by the attorney general in the name of the people, or a bill for an injunction by the municipality. (*Doane v. Lake Street etc. Ry. Co.*, 265.)

6. RAILROADS—NONDELIVERY FOR FAILURE TO PAY CAR SERVICE FEES—WRONGDOERS.—Although common carriers, members of a car service association, have no right to decline to switch cars for, or to refuse to deliver freight consigned to, those who refuse to pay car service fees, the shippers thus in default cannot invoke the aid of equity to restrain the carriers from refusing to deliver on their sidetracks, and to compel them to do that which they admit it is their duty to do, and which they are willing to do, upon a compliance by the shippers with the reasonable rules of the association. The shippers, having done the first wrong, and thus caused the wrongdoing of the carriers, are not in an attitude to ask a court of equity to right the wrong by compelling an unconditional delivery of cars to them, and the court may refuse to hear them. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

7. RAILROADS—DELIVERY NOT EXCUSED BY REFUSAL TO PAY CAR SERVICE FEES.—Common carriers, members of a car service association, have no right to decline to switch cars for,

or to refuse to deliver freight consigned to, those who refuse to pay for car service, although they have combined to resist the enforcement of the reasonable rules of the association; but the carriers' duty to deliver cannot be enforced by those who wrongfully refuse to pay for car service. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

8. RAILROADS—CAR SERVICE ASSOCIATION—RETENTION OF SHIPMENT UNTIL STORAGE CHARGES ARE PAID.—If, upon any particular shipment, storage charges have accumulated before it is unloaded by the consignee, and it is still in the car of the carrier, it may be retained until the regulations of the car service association are complied with and the charges paid. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

9. RAILROADS—CAR SERVICE ASSOCIATION—STORAGE CHARGES.—The fact that the delivering road, under car service rules, is authorized to collect storage charges on cars that do not belong to it but to other companies, and which are received from connecting lines, affords a shipper no just ground of complaint, as, under the universal practice among shippers, loaded cars are received from connecting lines, and are used and controlled by the receiving company as its own property. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

10. RAILROADS—CAR SERVICE RULE NOT IN VIOLATION OF LAW.—A rule of a car service association, fixing a uniform charge for the detention of cars by the consignor or consignee beyond a reasonable time in which to load or unload them, does not violate the law preventing agreements among rival carriers not to compete with each other. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

11. RAILROADS—CAR SERVICE ASSOCIATION—SEPARATE AND JOINT ENFORCEMENT OF RULES.—Railroad companies do not surrender their corporate autonomy and functions by relegating the control and management of their affairs to the control of a car service association; and, if the car service rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

12. RAILROADS—CAR SERVICE ASSOCIATION—CONSULTING SHIPPER.—If the rules of a car service association are reasonable, the fact that the shipper was not consulted in framing them does not vitiate them, nor can he complain of the fact that no reciprocity of indemnity or counter penalties are provided, as the carrier may be held accountable for any dereliction of duty. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

13. RAILROADS—CAR SERVICE RULES—HOW AFFECTED BY WEATHER.—It is no objection to a rule of a car service association imposing a charge upon the consignor or consignee for detaining a car beyond a reasonable time, that no exception is made in behalf of the shipper by reason of an unfavorable condition of the weather. The rule as to loading and unloading must allow time enough to meet all cases likely to arise, and, when it does so, a rare and exceptional circumstance incident to a particular shipper, at a particular time, cannot annul the rule. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

14. RAILROADS—CAR SERVICE ASSOCIATION—REASONABLENESS OF RULES—QUESTION OF FACT.—Whether a charge of one dollar per day, or fraction thereof, made for detention of cars, and use of track, on cars not unloaded within forty-eight hours after arrival, not including Sundays and legal holidays,

and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and whether the time fixed for the loading and unloading, as required by car service rules, is a reasonable time, are questions of fact. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

15. RAILROADS—CAR SERVICE ASSOCIATION—CHARGE FOR DETENTION OF CARS.—If a common carrier's cars are detained by the consignor or consignee beyond a reasonable time within which to load and unload them, there may be a reasonable charge for such detention, which may be imposed by, and enforced through, what are known as car service associations. (*Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co.*, 326.)

16. RAILROADS—DELIVERY OF FREIGHT—DAMAGES FOR DELAY.—If one engaged in equipping a cotton factory, and having men employed under pay, ships machinery for his factory on a railroad, and the company is negligent in failing to deliver the freight within a reasonable time, whereby the men are forced to remain idle, the measure of damages for the delay is interest on the unemployed capital, the wages paid to the men, and other damages resulting from the delay and strictly traceable to it. (*Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 682.)

17. RAILROADS—PARTNERSHIP ASSOCIATION OF LINES—JOINT LIABILITY.—If two or more railroad companies form an association which establishes a through line for the transportation of freight, with through bills of lading, giving the names of the traffic agents of the different lines, the freight charges to be paid at the point of receipt or of delivery, and to be divided in proportion to the number of miles on each road over which the goods are carried, such companies become partners, under the name of the association, though they are still common carriers, and they and their connecting lines are jointly liable, each for the others, for damages caused by delay, or otherwise, on any part of the through line, irrespective of a provision in the bill of lading that each company shall not be liable for any damages beyond its own line. (*Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 682.)

18. RAILWAYS—BONDS AND SUBSCRIPTIONS—CHANGE IN LOCATION OF ROAD AS AFFECTING RIGHTS TO.—If a railway had been located through a municipality, when a proposition was submitted to the authorities thereof, and a vote taken to determine whether it should subscribe for stock and issue bonds therefor, such location is presumed to be a part of the proposition, which cannot be afterward departed from without the consent of the voters, manifested as provided by law; and if the location of such road is subsequently changed without such consent, mandamus will not issue to compel the execution of the bonds. Nor can the corporation maintain its rights to such bonds by showing that the location of the road as thus changed is near the corporate limits and easily accessible to the inhabitants of the town, and that such limits might be extended so as to include the present location. (*Ravenswood etc. Ry. Co. v. Ravenswood*, 906.)

19. RAILWAYS—CATTLE KILLED, LIABILITY FOR VALUE OF THEIR CARCASSES.—If cattle are killed by a railway train under such circumstances that the corporation cannot be adjudged guilty of negligence and held liable for such killing, their carcasses, nevertheless, remain the property of their owners, and if the corporation has, by its agents, refused to permit such owners to take possession thereof and remove the same, it is liable for the value of the animals in the condition in which they were when the owners' right to remove their remains was thus denied. (*Kirk v. Norfolk etc. R. R. Co.*, 899.)

20. RAILWAYS, LIABILITY FOR USE OF SALT ON A TRACK WHEREBY DOMESTIC ANIMALS ARE ATTRACTED AND KILLED.—The use of salt in thawing out switches, and thus preventing the accumulation of ice from throwing trains from the track, though it attracts cattle thereto and results in their being killed by passing trains, is not negligence on the part of a railway corporation, and does not subject it to liability for the cattle so destroyed, if it appears that such use of the salt was a necessity to protect the lives of passengers and others, who travel on railway trains, and a failure to use it, would, in the case of an accident caused by such failure, be regarded as an act of negligence. (*Kirk v. Norfolk etc. R. R. Co.*, 899.)

See *Electric Companies*, 1-4; *Municipal Corporations*, 21; *Sunday*, 1-3.

REAL PROPERTY.

1. LANDOWNER'S LIABILITY FOR PONDS OF DEEP WATER.—If a pond of water exists on premises adjacent to a public highway, or is created there by the action of a municipality in grading a street, the landowner is not answerable for the death of a child which goes to such pond without invitation, and is drowned therein. (*Peters v. Bowman*, 106.)

2. THE OWNER OF LAND IS ORDINARILY UNDER NO DUTY TO KEEP HIS PREMISES SAFE FOR TRESPASSERS.—The exceptions to the rule arise when he maintains on his land something in the nature of a trap or other concealed danger, known to him and of which he has given no warning, and also when there has been something in the nature of a wanton injury to a trespasser. The rule is applicable to children as well as to adults. (*Peters v. Bowman*, 106.)

3. A CONVEYANCE FROM A PERSON NOT SHOWN TO HAVE EVER BEEN IN POSSESSION of the property, or to have had at the time of the conveyance any title therein, does not tend to prove any title in the grantee. (*Lake v. Hancock*, 159.)

4. NEGLIGENCE—DANGEROUS PREMISES—TRESPASSERS. The owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is not required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon such premises, not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. (*Moran v. Pullman etc. Car Co.*, 543.)

5. NEGLIGENCE—DUTY OF OWNER TO FENCE CITY LOT—INJURY TO TRESPASSER.—An owner of an unfenced city lot is not liable in damages for the death of a person, old or young, who goes upon the premises without invitation or permission, and is drowned while bathing in a pond on the lot. (*Moran v. Pullman etc. Car Co.*, 543.)

See *Lis Pendens*.

RECEIVERS.

1. A RECEIVER MAY BE APPOINTED BEFORE AN ANSWER IS FILED, if the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss. (*Murray v. Murray*, 97.)

2. RECEIVER IN A SUIT BY WIFE FOR MAINTENANCE.—In a suit for maintenance, the court may appoint a receiver at the commencement of the suit, and authorize him to take possession of the property of the husband and apply it to the satisfaction of the maintenance decreed to the wife. (*Murray v. Murray*, 97.)

RELEASE.

NEGLIGENCE CAUSING DEATH—RELEASE OF RIGHT OF ACTION FOR—RIGHTS OF PERSONAL REPRESENTATIVE. If a husband, after receiving a personal injury, accepts a sum of money and gives an absolute release of all demands arising therefrom, his widow cannot maintain an action to recover for his death, resulting from such injury, under statutes providing "that no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction"; and "that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Such statutes do not give an independent right of action for the death of the husband which he cannot release in his lifetime. (*Hill v. Pennsylvania R. R. Co.*, 754.)

REPLEVIN.

REPLEVIN.—THE OMISSION OF A PLAINTIFF in an action of replevin to sign the affidavit upon which he obtains the writ is at most an irregularity which does not invalidate the writ nor deprive the officer of protection in executing its commands. (*Henline v. Reese*, 736.)

RES JUDICATA.

See Cotenancy, 3; Judgment, 3-5, 8-13.

RESTRAINT OF TRADE.

See Contracts, 1, 5, 7.

RESULTING TRUSTS.

See Trusts, 1-3.

RIGHT OF WAY.

See Cotenancy, 2; Homesteads, 3.

SALES.

1. SALES—THE MAXIM OF CAVEAT EMPTOR DOES NOT APPLY TO SALES BY A MANUFACTURER.—He is liable for any latent defects arising from the processes of manufacture or the use of defective materials, upon the ground of an implied warranty. (*Bierman v. City Mills Co.*, 635.)

2. MANUFACTURER, LIABILITY OF.—If goods to be delivered are sold, though by a person not authorized to represent the manufacturer, and he affirms the sale, his adoption of it charges him with notice of the use to which the goods are to be put, and imposes on him the duty of furnishing goods which are marketable and reasonably fit for use, and renders him answerable for any consequent liability for a failure attributable to defects in the process of manufacture or in the materials employed. (*Bierman v. City Mills Co.*, 635.)

3. IMPLIED WARRANTY, WHEN NOT WAIVED BY THE USE AND RETENTION OF GOODS.—If a manufacturer sells felt, to be used in the making of clothing, and upon its delivery to the purchaser, it is so used by him, he does not waive an implied warranty in his favor if a defect existed in the felt which was not discoverable upon inspection, and could not be ascertained except by actual wear. (*Bierman v. City Mills Co.*, 635.)

4. WARRANTY IMPLIED IN THE SALE OF ARTICLES TO BE MANUFACTURED.—If a sale is made of articles to be manufactured, there is an implied promise that the articles to be delivered shall be marketable and free from any remarkable defect. (*Bierman v. City Mills Co.*, 635.)

See Goodwill.

SCHOOL ELECTIONS.

See Mandamus, 1, 4.

SEAMEN'S WAGES.

See Shipping, 1-3.

SEDUCTION.

1. SEDUCTION—CRIMINAL INTIMACY WITH OTHER MEN. EVIDENCE that the prosecutrix, on a trial for seduction, had been criminally intimate with other men after the date of her alleged seduction is inadmissible. (*Bracken v. State*, 23.)

2. SEDUCTION—CONFESSIONS.—A SUFFICIENT PREDICATE for the admission of a confession, made to a witness by the defendant, in a prosecution for seduction, is laid; and the confession is admissible in evidence, where it is shown that the witness, a brother of the prosecutrix, went to a field, where the defendant was at work, and had a conversation with him, at which no third person was present; that at the time he had no weapon with him, made no threats, and held out no promises or inducement to the defendant, and that he did not say that it would be better for the defendant to tell all about it. (*Bracken v. State*, 23.)

3. SEDUCTION—EVIDENCE—DESTROYED LETTER ABOUT MARRIAGE.—The testimony of the prosecutrix, on a trial for seduction, that she received a letter from the defendant, in which he said something about marrying her, is admissible, although she destroyed the letter, if it is not shown that she had any wrong motive in doing so. (*Bracken v. State*, 23.)

4. SEDUCTION—EVIDENCE.—CRIMINATIVE LETTERS written by the defendant, in a prosecution for seduction, to the prosecutrix, after the date of the alleged seduction, are admissible in evidence, where the handwriting has been proved, and the genuineness of the letters is not denied. (*Bracken v. State*, 23.)

5. SEDUCTION — CONVERSATIONS — EXAMINATION OF WITNESS.—If the prosecutrix, upon cross-examination, on a trial for seduction, denies having told a third person, in conversation, that she had been seduced by the defendant, she should be allowed, on redirect examination, to state what she did say. (*Bracken v. State*, 23.)

6. SEDUCTION—HOW ACCOMPLISHED—INSTRUCTIONS.—The offense of seduction accomplished by means of temptation, deception and arts and acts of flattery, is as criminal as if accomplished by a promise of marriage. Hence, it is proper to refuse a charge which ignores this manner of accomplishing the crime. (*Bracken v. State*, 23.)

SERVICES.

CONTRACT—PROMISE TO PAY FOR PERSONAL SERVICES.—No binding promise to make compensation for personal services can be implied or inferred in favor of one person against another, unless the party furnishing the services then expected, or had reason to expect, such compensation from the other party. (*Lafontaine v. Hayhurst*, 430.)

SETOFF.**See Banks, 5.****SHERIFF.**

1. SHERIFF, WHEN NOT LIABLE IN TROVER FOR A WRONGFUL LEVY.—Though the levy of an attachment was wrongful, yet if the owner of the property was not thereby deprived of its care or custody, he cannot maintain an action for its conversion commenced after its loss by fire without the fault of the officer. (*Sammis v. Sly*, 731.)

2. SHERIFF, WHEN NOT LIABLE FOR LOSS BY FIRE OF PROPERTY LEVIED UPON.—If a sheriff under a writ against one person levies on the property of another, without taking it into his possession or doing any act which would prevent such owner from taking possession of and disposing of such property, and it is subsequently destroyed by fire, without the fault of either party, the sheriff is not answerable therefor. (*Sammis v. Sly*, 731.)

3. SHERIFF—JUSTIFICATION OF UNDER A WRIT VOID FOR WANT OF JURISDICTION.—While a ministerial officer, having knowledge from a source other than the writ that the court or officer issuing it was without jurisdiction of the person against whom it was directed, is not obliged to serve it, and may decline to do so without subjecting himself to any liability, yet he may, nevertheless, relying on its regularity, execute it according to its commands, and plead it in justification of his acts in doing so. (*Henline v. Reese*, 786.)

SHIPPING.

1. SHIPPING—LIABILITY FOR SEAMAN'S WAGES.—The fact that a master "sails," or "hires," or "takes" a vessel on shares, implies that he fully controls the management of the vessel for the time being, and without anything else appearing, exonerates the owners from personal liability to pay seaman's wages. (*Marshall v. Boardman*, 392.)

2. SHIPPING—LETTING ON SHARES—LIABILITY FOR SEAMAN'S WAGES—EVIDENCE.—Conditions or qualifications annexed to the contract of hiring or letting a vessel on shares which would deprive the owner of exemption from personal liability for seaman's wages earned during the term of the lease are not to be presumed; they must be proved. (*Marshall v. Boardman*, 392.)

3. SHIPPING—LETTING ON SHARES—LIABILITY FOR SEAMEN'S WAGES.—A part owner of a vessel, let to a master on shares, is not personally liable for seamen's wages, although he procured the charter for the trip made by the vessel during which such wages were earned. (*Marshall v. Boardman*, 392.)

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—MUTUALITY, WANT OF—OPTIONS.—A contract giving a person an option to sell shares of stock to another at a price specified, but not requiring him to make such sale, has no mutuality, and therefore will not be enforced in equity. (*Hissam v. Parrish*, 892.)

2. SPECIFIC PERFORMANCE—VARIANCE.—If the contract proved differs from that pleaded, specific performance will be denied. (*Hissam v. Parrish*, 892.)

3. SPECIFIC PERFORMANCE, ADEQUATE REMEDY AT LAW.—A contract to buy a specified number of shares of the capital stock of a corporation at a price designated will not be specifically enforced in equity at the suit of the vendor. His remedy at law is adequate. (*Hissam v. Parrish*, 892.)

STATES.

See Interstate Commerce, 1.

STATUTE OF LIMITATIONS.

See Executors and Administrators, 4; Limitations of Actions, 4.

STATUTES.

1. CONSTITUTIONAL LAW.—ALL REASONABLE DOUBTS must be solved in favor of legislative action. Every statute must, therefore, be sustained, unless its conflict with the constitution is beyond reasonable doubt. (State v. Camp Sing, 551.)

2. CONSTITUTIONAL LAW—CONSTRUCTION.—If the intention of any given clause of a state constitution is not clear, it will not be so construed as to annul a statute enacted by the state legislature. (State v. Camp Sing, 551.)

See Evidence, 7, 8.

STOLEN PROPERTY.

See Trover, 2.

STREET RAILWAYS.

See Electric Companies, 1-4; Injunctions, 1, 2; Railroads.

STREETS.

See Municipal Corporations.

SUBROGATION.

SUBROGATION—SURETY—VOLUNTEER.—If one advancing money to pay the debt of another occupies the place of a surety, or is compelled to pay the debt to protect his own rights, he is entitled, without any agreement to that effect, to be subrogated to the rights of the creditor, but a mere volunteer who so advances the money without any agreement is not so entitled, and his payment extinguishes the lien as well as the debt. (Martin v. Martin, 219.)

See Vendor and Purchaser, 1.

SUNDAY.

1. SUNDAY LAWS—CONSTITUTIONALITY OF—INTER-STATE COMMERCE.—A state statute making it a misdemeanor to run freight trains on Sunday, is not unconstitutional, where it contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any other intent than to prescribe a rule of civil conduct for people within the state, although it may affect interstate commerce, to some extent, so far as running freight trains from one state to another is concerned. (State v. Southern Ry. Co., 689.)

2. CRIMINAL LAW—RUNNING FREIGHT TRAINS ON SUNDAY—DEFENSE—EVIDENCE.—Upon an indictment for running a freight train on Sunday, where the defense is that it was necessary to run the train, after the hour fixed by statute, in order to relieve severe suffering, to preserve the health, and to save the lives, of the crew, evidence that water and food could not be obtained at a certain station, passed by the train, before reaching a given point, is insufficient to support such defense, where it is not shown that both food and water could not have been obtained at any other town or station passed by the train, before reaching such point. (State v. Southern Ry. Co., 689.)

3. CRIMINAL LAW—RUNNING FREIGHT TRAINS ON SUNDAY—VIOLATION OF STATUTE.—If a statute makes it a misdemeanor to run a freight train after 9 o'clock on Sunday morning, it is prima facie a violation of the statute to show that such a train was run at 10:25 o'clock A. M. of that day; and, if the defense to an indictment for running a freight train on Sunday is, that it was necessary to run after the hour fixed, as the limit, by statute, in order to preserve the health, or to save the lives, of the crew, or to relieve them from severe suffering, it is incumbent on the defendant to show that the act was done under the stress of such necessity. (*State v. Southern Ry. Co.*, 689.)

SURETYSHIP.

1. SURETYSHIP—MERE INDULGENCE DOES NOT DISCHARGE SURETY.—Mere passive indulgence by the payee of a note to the maker does not release the surety, although interest is paid, at a specified rate, according to agreement, at the end of each year, as the payee's acceptance of interest for a preceding year does not imply an agreement that he will not sue for another year, and does not, therefore, deprive the surety of his right to require the creditor to sue at any time, or to pay the debt himself, and be subrogated to the rights of the creditor. (*Alley v. Hopkins*, 382.)

2. BONDS—FAILURE OF PRINCIPAL TO SIGN — LIABILITY OF SURETIES.—An official or statutory bond, whether joint or several, in which the name of the principal is called for and which is not signed by him, is not only void as to him, but is prima facie void as to all who sign it as sureties; and, to hold them liable, the obligee in the bond has the burden of proof to show that they consented to be bound without the signature of the principal. (*Gay v. Murphy*, 496.)

3. BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—An official or statutory bond not signed by the principal, when purporting to be executed by him, is prima facie invalid as to the sureties. The presumption is, that each one of the sureties signed the bond upon the understanding that the others named as obligors, and especially the principal, would sign it. (*Gay v. Murphy*, 496.)

4. BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETIES.—A joint and several bond given by a contractor reciting that it is executed by him as principal and others as sureties contains an implied promise that it shall be signed by the principal before delivery to the obligee, and, if not so signed, it is prima facie void as to the sureties, and the burden of proof is on the obligee to show that the sureties consented to be bound without the signature of the principal. (*Gay v. Murphy*, 496.)

5. PRINCIPAL AND SURETY—THE LIABILITY OF THE LATTER IS DEPENDENT UPON THAT OF THE FORMER, and an action cannot be maintained against one as surety if his principal is not liable. This remains true though the surety might have been sued as principal and a recovery had against him in that capacity, as where he who was sued as a surety on the bond of a constable was himself liable for the act of the constable, though the latter was protected from liability by a process in his hands regular upon its face. (*Henline v. Reese*, 736.)

6. SURETYSHIP—INTERPRETATION OF CONTRACT.—A contract of suretyship, though only enforced according to its terms, is, nevertheless, nothing more than a contract, and, in construing it, the actual intention of the parties must prevail. (*Fink v. Farmers' Bank*, 746.)

See Limitations of Actions, 1; Officers, 6-8; Subrogation.

TAXES.

1. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS IS CONSTITUTIONAL.—A statute requiring every foreign building and loan association, doing business in the state, to pay into its treasury, annually, two dollars on every one hundred dollars of its annual gross receipts, does not violate either the state or federal constitution. (*Southern Building etc. Assn. v. Norman*, 367.)

2. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—FRANCHISE.—A state tax upon the gross receipts of a foreign building and loan association is a tax upon the franchise of the corporation, measured by the extent of its business, and not a tax upon its property. It is not, therefore, unconstitutional as violating a statute providing for taxation based on income, licenses, or franchises. (*Southern Building etc. Assn. v. Norman*, 367.)

3. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—TAX FOR DOING BUSINESS, EFFECT OF.—If a state tax upon a foreign building and loan association is found to be, in effect, a franchise tax, the corporation cannot complain that its property is otherwise taxed or is nontaxable. (*Southern Building etc. Assn. v. Norman*, 367.)

4. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—DOUBLE TAXATION.—A statute requiring every foreign building and loan association, doing business in the state, to pay into its treasury, annually, two dollars on every one hundred dollars of its annual gross receipts, does not impose double or unequal taxation, because, while the subscribers for paid-up stock pay on their shares, the company pays no annual tax thereon, but simply a tax for the privilege of doing business. (*Southern Building etc. Assn. v. Norman*, 367.)

5. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—IMPAIRING OBLIGATION OF CONTRACTS.—A state tax upon the annual gross receipts of a foreign building and loan association, not being a tax upon the property of the corporation, does not impair the obligation of contracts of subscription made before the law was passed. (*Southern Building etc. Assn. v. Norman*, 367.)

6. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—EQUAL PROTECTION OF LAWS.—If a statute taxing the annual gross receipts of a foreign building and loan association imposes substantially the same burden upon other like corporations, similarly situated, it does not deny to any the equal protection of the laws. (*Southern Building etc. Assn. v. Norman*, 367.)

7. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—ENTRY OF CORPORATION BEFORE PASSAGE OF STATE LAW.—The fact that a foreign building and loan association enters a state before the enactment of any law therein to tax its privileges, does not preclude the state from afterward imposing a reasonable tax on the right of the corporation to transact business, and rating it according to the amount of business done after the enactment of the law. (*Southern Building etc. Assn. v. Norman*, 367.)

8. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—EQUAL PROTECTION OF LAWS—FEE FOR LICENSE.—The imposition of a charge of twenty-five dollars on the agent of a foreign building and loan association, fixed on all alike, does not affect the right of the state to tax the annual gross receipts of the corporation, as it is in the nature of a fee for the li-

cense, not exceeding the cost of its issuance, and the regulations respecting it. (Southern Building etc. Assn. v. Norman, 367.)

9. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—METHOD.—As between a domestic corporation and a foreign building and loan association, the state may adopt different plans of taxation without necessarily discriminating against either. (Southern Building etc. Assn. v. Norman, 367.)

10. TAXATION OF FOREIGN BUILDING AND LOAN ASSOCIATIONS—INTERSTATE COMMERCE.—A state tax upon the annual gross receipts of a foreign building and loan association, and which in express terms affects only business done within the state, is not an interference with the freedom of commerce between the states. (Southern Building etc. Assn. v. Norman, 367.)

11. IDEM SONANS—TAX SALE.—The names "Lane" and "Leane" are not idem sonans, and a tax sale against Lane does not affect the interest of Leane. (Geer v. Missouri Lumber etc. Co., 489.)

See License, 2.

TELEGRAPH COMPANIES.

TELEGRAPH COMPANIES—CIPHER MESSAGE—DELAY—MEASURE OF DAMAGES.—If a message as delivered to a telegraph company for transmission is in cipher or unintelligible, except to the sender or the addressee, and the company has no information as to its character or purport, nor of its importance or urgency, the party injured by delay or mistake in the transmission of the message can recover nothing beyond nominal damages, or, at most, the price paid for transmission. (Ferguson v. Anglo-American Tel. Co., 770.)

See Joint Liability, 1.

TRADE RESTRAINTS.

See Contracts, 1, 5, 7; Monopolies, 1.

TRESPASS.

TRESPASS—PLEADING—DESCRIPTION OF PREMISES.—In an action of trespass quare clausum fregit, the description of the close alleged to have been broken, though not particularly definite, is sufficient, if the defendant is not misled, or uncertain as to the particular locus in quo. (Bessemer Land etc. Co. v. Jenkins, 26.)

TRIAL.

1. EVIDENCE.—NEGATIVE TESTIMONY is not entitled to the same weight as affirmative. (West Chicago etc. Ry. Co. v. Mueller, 263.)

2. JURY TRIAL—WEIGHT OF EVIDENCE.—It is never the province of the court to tell the jury which class of conflicting testimony is entitled to greater weight. (West Chicago etc. Ry. Co. v. Mueller, 263.)

3. NEGATIVE TESTIMONY, WHAT IS.—If one or more witnesses testify to being present upon a designated occasion and that certain facts then took place, and other witnesses testify to being present at the same time and that such facts did not take place, the testimony of the latter is not negative. (West Chicago etc. Ry. Co. v. Mueller, 263.)

4. PRACTICE.—OBJECTIONS TO EVIDENCE are not available unless the grounds of objection are specified. (Gunter v. State, 17.)

5. PRACTICE.—A MOTION TO STRIKE OUT PLAINTIFF'S TESTIMONY on the ground of variance between it and the com-

plaint is properly denied, unless the moving party points out the variance, and shows in what it consists. (*Chicago v. Seben*, 245.)

6. **PRACTICE—WAIVER.**—A motion to exclude the plaintiff's evidence is waived by the defendant's proceeding to trial and producing evidence in his own behalf. (*Goff v. Miller*, 889.)

7. **PRACTICE—JURY TRIAL.**—If the counsel for the defendant desires to make an opening statement to the jury, he may be required to make it at the close of the plaintiff's statement, and has no right to reserve his statement until after the plaintiff has closed his case. This question is one which is within the discretion of the trial court. (*Sands v. Potter*, 253.)

8. **CHANGE OF VENUE—DISCRETION OF TRIAL COURT.**—Though an accused is always entitled to be tried by an impartial jury, the ruling of a trial court denying an application for a change of venue in a criminal cause will not be disturbed, unless it appears that such court acted unfairly to permit a palpable abuse of sound discretion. (*Singleton v. State*, 170.)

9. **TRIAL—ORDER OF SPECIAL VENIRE.**—An order for a special venire is unobjectionable where the sheriff is directed to summon only freeholders who have paid their taxes for the preceding year, who have not served on the jury within the last two years, who have no suits pending and at issue in the court, and who are not under indictment in the court. (*State v. Cody*, 692.)

TROLLEY WIRES.

See *Electric Companies*, 1-4; *Joint Liability*, 1.

TROVER.

1. **A TECHNICAL CONVERSION DOES NOT CHANGE THE TITLE** to the property until the owner elects that it shall do so, and if it is destroyed before such election, without fault of the person guilty of such technical conversion, he is not answerable for the loss thereof. (*Sammis v. Sly*, 731.)

2. **CONVERSION—BROKERS BUYING AND SELLING STOLEN PROPERTY.**—A broker who, in good faith, sells stolen property for a thief on commission, and a broker who acts in good faith on commission for the buyer of such property, are both liable to the true owner thereof for conversion. (*Fort v. Wells*, 816.)

See *Cotenancy*, 4; *Sheriffs*, 1.

TRUSTS.

1. **A RESULTING TRUST DOES NOT ARISE** in favor of a person who furnishes money with which to purchase property, the conveyance being taken in the name of another, if there is a legal and moral obligation on the part of the former to provide for the latter, as where the parties are wife or child of the person whose funds have been so employed. The presumption that under such circumstances no trust was intended is one of fact, and not of law, and may be rebutted by evidence of circumstances tending to show the existence of a trust. (*Deck v. Tabler*, 837.)

2. **RESULTING TRUST.—WHEN LAND IS PURCHASED AND PAID FOR BY ONE PERSON**, but the conveyance is made to another, the law ordinarily implies a trust in favor of the former, and such payment and purchase may be proved by parol. (*Deck v. Tabler*, 837.)

3. **EVIDENCE TO ESTABLISH A RESULTING TRUST.**—DECLARATIONS OF A HUSBAND after the death of his wife are not sufficient to establish a resulting trust in his favor in land pur-

chased and paid for by him and by his direction conveyed to her. Statements made by both at the time of the purchase, to the effect that the husband, being in business, was afraid something might happen to him, and that she was to make a will by which the property should go to him on her death, tend to repel, rather than to establish, the existence of a resulting trust in his favor. (Deck v. Tabler, 837.)

See Corporations, 23-26; Guardian and Ward, 2-4; Judgment, 3.

VENDOR AND PURCHASER.

1. **VENDOR AND VENDEE—VENDOR'S LIEN—SUBROGATION.**—A vendor's lien is personal to himself and not assignable, nor can a third party, by voluntarily paying the amount of the purchase money secured by such lien, acquire it by subrogation. (Martin v. Martin, 219.)

2. **VENDEE IN POSSESSION, ACQUISITION OF ADVERSE TITLE BY.**—One who has contracted for the purchase of land, and gone into possession thereof under such contract, cannot dispute his vendor's title, nor set up an outstanding title as a defense to an action brought against him by his vendor to recover possession of the property. (Lake v. Hancock, 159.)

3. **UNRECORDED CONVEYANCE, BURDEN OF PROVING WANT OF NOTICE.**—A purchaser of property need not prove his want of notice of a pre-existing unrecorded conveyance thereof except by proving the absence of such record. (Lake v. Hancock, 159.)

4. **NOTICE OF A PRE-EXISTING UNRECORDED CONVEYANCE MAY BE IMPUTED** to a subsequent grantee from evidence of his admission that he knew his grantor did not own the land, and that the deed was of no account. (Lake v. Hancock, 159.)

5. **VALUABLE CONSIDERATION, BURDEN OF PROVING PAYMENT OF.**—Where, after the execution of a conveyance, which is not recorded, the grantor conveys the same property to another, the latter must assume the burden of proving that he was a purchaser for a valuable consideration. Recitals in the conveyance of the payment of such consideration are not evidence thereof. (Lake v. Hancock, 159.)

6. **A CONVEYANCE FROM A PERSON NOT SHOWN TO HAVE EVER BEEN IN POSSESSION** of the property, or to have had at the time of the conveyance any title therein, does not tend to prove any title in the grantee. (Lake v. Hancock, 159.)

VESTED REMAINDERS.

See Devise, 1, 2.

WAGES.

See Executors and Administrators; Shipping, 1.

WARRANTS.

See Counties.

WATER COMPANIES.

WATER COMPANY—DUTY TO FURNISH WATER TO ALL PERSONS.—A water company having a franchise in a municipality entitling and requiring it to supply the inhabitants thereof with water for general use, at prices specified in the grant of the franchise, has no authority to adopt and enforce a rule that it will deal only with the owners of property for which water is required. A tenant of such property, whether his lessor agrees to become responsible or not, is entitled to a writ of mandate to compel the furnishing of

water to such tenant upon his tender of the amount which the company is entitled to charge therefor. (*State v. Butte City Water Co.*, 574.)

WILLS.

WILLS—POWER OF APPOINTMENT—INVALID EXERCISE OF.—If a power of appointment in a will is restricted to particular children of the testator by name, it cannot be exercised by the appointment in favor of grandchildren of the testator. Such an exercise of the power is invalid. (*Thorington v. Hall*, 54.)

See *Devise*, 1.

WIRES.

See *Electric Companies*, 1-4; *Joint Liabilities*, 1; *Municipal Corporations*, 17.

WITNESSES.

1. WITNESSES—EVIDENCE OF INTEREST.—As evidence of a witness' interest is admissible, a witness for the plaintiff should be allowed, for the purpose of showing his interest against the defendant, to answer the question whether the plaintiff has not brought suit against him for the same thing and whether that suit has been finally determined. (*Bessemer Land etc. Co. v. Jenkins*, 28.)

2. WITNESSES—EVIDENCE OF OMISSION FROM BOOK OR PAPER OF PARTICULAR FACT.—A witness, with a writing in his hands, may testify that it does not contain a particular fact. Hence, the secretary and bookkeeper of a corporation, having its minute-books in his hands, may testify that no part of a particular report made by officers of the corporation, at a meeting of the stockholders, was rejected by the latter, so far as the books show, notwithstanding defendant's objection that the proper evidence is the minutes of the meeting. (*Bessemer Land etc. Co. v. Jenkins*, 28.)

3. EVIDENCE—A LEADING QUESTION IS ONE WHICH SUGGESTS or puts a desired answer in the mouth of a witness. A question is not necessarily leading because it may be answered by "yes" or "no." (*Coogler v. Rhodes*, 170.)

4. EVIDENCE—LEADING QUESTION.—An interrogatory, in writing, addressed to a witness asking him whether or not he knew that A ran a house of prostitution in a town designated, and, if "yes," when and for how long a time, is not objectionable as a leading question. (*Coogler v. Rhodes*, 170.)

5. EVIDENCE—EXPERT.—A witness may be permitted to testify as an expert, when shown to be qualified by experience, that if an opening in a sewer inlet or catch-basin is more than a foot wide, it is practicable to put an iron grating over it. (*Chicago v. Seben*,

See *Instructions*, 5; *New Trial*.

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